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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 307

ISBRANDTSEN-MOLLER CO., INC., APPELLANT

v.

THE UNITED STATES OF AMERICA ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the United States District Court for the Southern District of New York (R. 47) is reported in 14 F. Supp. 407.

JURISDICTION

The decree of the District Court was entered May 22, 1936 (R. 58). The petition for appeal (R. 59) was filed and allowed (R. 71) the same day. Probable jurisdiction was noted by this Court on October 12, 1936.

Jurisdiction of this Court is invoked under Section 31 of the Shipping Act, 1916, c. 451, September 7, 1916, 39 Stat. 738 (U. S. C., Tit. 46, Sec. 830), Section 208 of the Judicial Code (U. S. C., Tit. 28, Sec. 46), and the Act of October 22, 1913, c. 32, 38 Stat. 219 (U. S. C., Tit. 28, Secs. 43, 44, 45, and 47).

QUESTIONS PRESENTED

Appellant seeks to enjoin the enforcement of an order issued by the Secretary of Commerce which required appellant to file certain information with respect to rates charged for the transportation of freight in foreign commerce. In issuing the order, the Secretary exercised statutory authority originally conferred upon the United States Shipping Board by Section 21 of the Shipping Act, 1916, c. 451, 39 Stat. 736 (hereinafter referred to as the Shipping Act). By Section 12 of Executive Order 6166, promulgated June 10, 1933, pursuant to the provisions of Title IV of the Legislative Appropriation Act of June 30, 1932, 47 Stat. 414, as amended, the United States Shipping Board was abolished and the functions of that body transferred to the Department of Commerce.

The principal questions presented by the appeal are:

1. Whether the order issued by the Secretary was one the issuance of which was within the statutory authority of the Shipping Board under the provisions of the Shipping Act.

2. Whether the order issued by the Secretary amounted to an attempted illegal search and seizure.

3. Whether the order issued by the Secretary was arbitrary and unreasonable.

4. Whether Title IV of the Legislative Appropriation Act of June 30, 1932, as amended, authorized the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce.

5. Whether the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce was subsequently ratified by Congress.

6. Whether Title IV improperly delegated legislative power to the President.

7. Whether Title IV was unconstitutional if, as appellees contend, it authorized the transfer of quasi-legislative and quasi-judicial functions to an executive agency.

STATUTES INVOLVED

The pertinent provisions of the Shipping Act, c. 451, 39 Stat. 736 (U. S. C., Tit. 46, Sec. 820), are printed in the appendix, *infra*, pp. 92–102.

Title IV of the Act of June 30, 1932, c. 314, 47 Stat. 414, as amended by c. 212, 47 Stat. 1517 (U. S. C., Tit. 5, Secs. 124–132), also appears in the appendix, *infra*, pp. 88–92.

STATEMENT

This is an appeal from a decree of a specially constituted three judge District Court for the Southern District of New York dismissing a bill of complaint which sought a preliminary and a permanent injunction restraining the enforcement of an order issued by the Secretary of Commerce on November 18, 1935 (R. 58–71).

The bill of complaint was filed by appellant, a corporation organized under the laws of the State of New York and engaged in the operation of steamships in foreign commerce, on January 3, 1936 (R. 3–16). Appellant named as defendants the United States, the Department of Commerce, the Shipping Board Bureau of the Department of Commerce, Daniel C. Roper, individually and as Secretary of Commerce, James C. Peacock, individually and as Director of the Shipping Board Bureau, and Lamar Hardy, United States Attorney for the Southern District of New York (R. 3).

The suit was instituted under Section 31 of the Shipping Act, 39 Stat. 738 (U. S. C., Tit. 46, Sec. 830), which provides that the venue and procedure in suits brought to enjoin an order of the Shipping Board shall be the same as in similar suits in regard to orders of the Interstate Commerce Commission; Section 208 of the Judicial Code (U. S. C., Tit. 28, Sec. 46); and the Act of October 22, 1913, c. 32, 38 Stat. 219 (U. S. C., Tit. 28, Secs. 43, 44, 45, and 47), which provides that the venue of a

suit brought to set aside an order of the Interstate Commerce Commission shall be in the judicial district in which the petitioner has its principal office.

The complaint alleged five causes of action (R. 3–16). For the first cause of action it was alleged that: The Secretary of Commerce, acting under the Shipping Act, issued an order on November 18, 1935, requiring appellant to file with the United States Shipping Board Bureau of the Department of Commerce by December 16, 1935, information concerning specific rates which it had charged during the period from September 1, 1935, to November 12, 1935, for the transportation of property, with certain exceptions, from points in the United States to all points in foreign countries (R. 5–6). It was alleged that the Secretary had no legal authority to issue the order because Executive Order 6166, which abolished the Shipping Board and transferred its functions to the Department of Commerce, was not authorized by Title IV (R. 7–9); and Executive Order 6166 was also alleged to be invalid because it was not preceded by adequate hearings and was not based upon adequate findings of fact (R. 10). It was further alleged that if Title IV had purported to authorize the transfer of the functions of the Shipping Board to the Department of Commerce, it would be unconstitutional as a violation of the principle of separation of powers and because it improperly delegated legislative power to the President (R. 9–10).

Appellant alleged that it had exhausted its administrative remedies (R. 6–7, 10), that the enforcement of the order of the Secretary would cause irreparable injury to its business because the information required would be revealed to its competitors (R. 10); and that its legal remedy was inadequate because the penalties prescribed by Section 21 of the Shipping Act for the violation of the order would preclude it from raising its constitutional objections in a suit brought to enforce the order (R. 10–11).

The allegations of the second cause of action may be summarized as follows: That the Secretary of Commerce had transferred his duties and functions under the Shipping Act to defendant Peacock, as Director of the Shipping Board Bureau of the Department of Commerce (R. 12); that defendant Peacock was Chairman of the Board of Trustees and President of the United States Merchant Fleet Corporation, a private steamship corporation owning or controlling steamships operating in competition with appellant, and controls steamships whose operators are members of conferences or groups of steamship companies combined by contract to fix rates and further a shipping monopoly (R. 12); that all the stock of the Merchant Fleet Corporation is owned by the defendants and their interests are therefore inconsistent with the proper exercise of the regulatory and quasi-judicial functions vested by Congress in the Shipping Board (R. 13); and that the exercise of such powers by

the defendants constitutes a violation of the principle of separation of powers, and of the due process clause of the Fifth Amendment (R. 13).

The allegations of the third cause of action may be summarized as follows: That the order of the Secretary was not issued for a public purpose authorized by Congress, but to promote a shipping monopoly of appellant's competitors and to require appellant either to join a conference or shipping monopoly or suffer injury to its business from the disclosure of its rates to its competitors (R. 14); and that any provisions of law purporting to authorize the issuance of the order of the Secretary for such purposes would violate the Fourth and Fifth Amendments to the Constitution (R. 14).

The allegations of the fourth cause of action may be summarized as follows: That the order of the Secretary constituted an unjust discrimination against appellant in that it required appellant to file the actual rates charged by it on particular goods between named ports, whereas the only order issued to its competitors required merely the filing of general rate schedules which are not always observed (R. 15), and that the order was also discriminatory in that it was issued under Section 21 of the Shipping Act, violations of which carry a heavy penalty, whereas the order issued to appellant's competitors was not issued under that section and carried no penalties for non-observance (R. 15).

The allegations of the fifth cause of action were apparently intended to show a basis for equitable relief (R. 15-16).

At a hearing on January 10, 1936 (R. 17), the District Court, upon the unopposed application of appellant, issued an order for a hearing before a three-judge district court (R. 19-20). On January 21, 1936, the United States, Daniel C. Roper, and Lamar Hardy filed notice of motion to dismiss the bill on the ground that it failed to state a cause of action in equity (R. 20). On the same day the Department of Commerce, the Shipping Board Bureau of that Department, and James C. Peacock filed notice of special appearance and motion to quash service of summons upon them and to dismiss the bill as to them for want of proper jurisdiction and venue (R. 21). Appellant's motion for an interlocutory injunction and defendants' motions to dismiss were heard on February 15, 1936.

On April 8, 1936, the court rendered an opinion in which it held that appellant was not entitled to an interlocutory injunction, and that the bill did not state a cause of action and should be dismissed (R. 47-57). On May 22, 1936, the court entered its final decree, denying an injunction, dismissing the bill as to the Department of Commerce, the Shipping Board Bureau, and James C. Peacock

on the ground that they were not proper parties to the suit, and dismissing the bill as to the other appellees on the ground that it did not state facts sufficient to constitute a cause of action (R. 58–59). On the same day appellant filed its petition for appeal (R. 59–60) together with an assignment of errors (R. 61–71) and an order allowing appeal was entered (R. 71).

The appellant does not urge as error the action of the District Court in dismissing the bill as to the Department of Commerce, the Shipping Board Bureau, and James C. Peacock (appellant's brief, p. 2).

Subsequent to these proceedings there has been enacted the Act of June 29, 1936, commonly known as the Merchant Marine Act, 1936 (c. 858, 49 Stat. 1986), which created a commission to be known as the United States Maritime Commission and transferred the functions of the Shipping Board Bureau of the Department of Commerce to that Commission. By General Order No. 2, dated October 23, 1936, the United States Maritime Commission, pursuant to authority conferred by Section 204 (b) of the Merchant Marine Act, 1936, ordered that all orders and determinations issued by the Department of Commerce, in the exercise of functions, powers, and duties transferred to the commission by the Merchant Marine Act, 1936, and which were in effect at the time of that transfer

should continue in effect until modified, terminated, superseded, or repealed by this Commission or by operation of law.

SUMMARY OF ARGUMENT

The legal questions involved in this case fall logically into two groups: (1) Those which relate to whether the Secretary's order would have been valid if it had been issued by the Shipping Board; and (2) those which relate to whether Congress authorized the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce, and if it did, whether that authorization was a proper exercise of the constitutional powers of Congress.

So far as relates to the first group of questions, the appellees contend that the order issued by the Secretary was clearly authorized by Section 21 of the Shipping Act, and that the allegations of the bill of complaint show, on their face that the order was not unreasonable or arbitrary, and that it neither violates the prohibition of the Fourth Amendment against unreasonable searches and seizures, nor otherwise invades appellant's constitutional rights.

The second group of questions has in part ceased to be of importance in this case because of a development which has taken place since the de-

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General Order No. 2 was published in The Federal Register, No. [illegible], October 25, 1936, p. 1917.

cision below. On June 29, 1936, the Merchant Marine Act, 1936, c. 858, 49 Stat. 1986, became effective. That Act created the United States Maritime Commission and transferred to it the functions of the Shipping Board Bureau of the Department of Commerce. The language of this Act constituted a recognition and approval by Congress of the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce.

This ratification of the action of the President in transferring the functions of the Shipping Board to the Department of Commerce makes it unnecessary to consider appellant's contention that Title IV of the Legislative Appropriation Act of June 30, 1932, did not authorize the President's action. Appellant continues, however, to urge that contention, and consequently this brief will show that Title IV clearly authorized the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce, and that, in any event, even before the passage of the Merchant Marine Act, 1936, Congress had recognized and approved the action of the President.

The passage of the Merchant Marine Act, 1936, also makes it unnecessary to consider appellant's contention that even if Title IV did authorize the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce, the President's action was nevertheless invalid because Title IV was an improper delegation of legislative

power. The scope of the authority originally conferred upon the President by Title IV has ceased to be material, because Congress has now recognized and adopted his action in transferring the functions of the Shipping Board to the Department of Commerce. In any event, appellant's contention is without foundation because an analysis of Title IV shows that it did not unconstitutionally delegate legislative power to the President.

The fact that Title IV authorizes the delegation of quasi legislative or quasi judicial functions to an executive officer or department does not make the statute unconstitutional. The decision in *Humphrey's Executor* v. *United States*, 295 U. S. 602, does not support the proposition that Congress under the Constitution has no power to delegate quasi-legislative or quasi judicial powers to an executive department. Repeated decisions of this Court show that Congress may constitutionally delegate quasi-legislative and quasi-judicial power to an executive officer or department. Appellant's argument to the contrary is an attempt to engraft upon American constitutional law the novel and anomalous concept of a separate fourth branch of government consisting of independent commissions or bureaus which exercise quasi-judicial and quasi-legislative powers. This is a concept repugnant to long-established and commonly accepted principles of constitutional law and inconsistent with the decisions of this Court.

ARGUMENT

I

THE ORDER OF THE SECRETARY OF COMMERCE WAS AUTHORIZED BY THE SHIPPING ACT AND VIOLATES NO CONSTITUTIONAL RIGHTS OF APPELLANT

A. THE ISSUANCE OF THE ORDER WAS A PROPER EXERCISE OF THE AUTHORITY CONFERRED BY THE SHIPPING ACT

The pertinent provisions of the order of the Secretary follow (R. 5-6):

> *It appearing*, That full and complete information as to the rates and charges for or in connection with the transportation of certain property from continental United States to points in foreign countries by carriers by water in foreign commerce subject to the Shipping Act, 1916, is necessary to the proper administration of the regulatory provisions of said act;
>
> *It appearing further*, That Isbrandtsen-Moller Company, Inc., is a common carrier by water in foreign commerce subject to the Shipping Act, 1916;
>
> *It is ordered*, In pursuance of the powers conferred by Section 21 of the Shipping Act, 1916, that Isbrandtsen-Moller Company, Inc., be, and it is hereby, notified and required to file with the Division of Regulation, United States Shipping Board Bureau, of this Department, at its office in Washington, D. C., on or before December 16, 1935, each port-to-port and tran-shipment rate charged and/or collected by it during the period from September 1, 1935,

to November 12, 1935, both dates inclusive, for the transportation of property, except cargo loaded and carried in bulk without mark or count, from all points in continental United States of America to all points in foreign countries; indicated plainly as to each such rate, the place from and to which it was charged and/or collected, the effective date thereof, and the name, in alphabetic order, of each commodity moving thereunder; showing also each terminal or other charge, privilege or facility, granted or allowed, and any rules or regulations which in any wise changed, affected, or determined any part of any such aforesaid rate, or the value of the service rendered to the consignor or consignee;

The issuance of this order was authorized by Section 21 of the Shipping Act which provides in part as follows (U. S. C., Tit. 46, Sec. 820):

> The board may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, *rate, or charge*, or any memorandum of any facts and transactions appertaining to the business of such carrier or other persons subject to this chapter. Such report, account, record, *rate, charge*, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file

> any report, account, record, *rate, charge,* or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default. [Italics supplied.]

This section is cast in broad terms, and contains no qualifying restrictions. It authorizes the issuance of an order requiring a carrier subject to the Act (and it is conceded that the appellant is such a carrier) to file "any periodical or special report, or any account, record, *rate,* or *charge* * * * appertaining to the business of such carrier."

The purpose for which this authority was conferred is shown by regulatory provisions found elsewhere in the Act. Section 14 prohibits the allowance of rebates by carriers to shippers; the employment of "fighting ships" to destroy competition; the use of unfair methods to induce the patronage of shippers; and the making of discriminatory contracts with shippers on the basis of the volume of freight offered (U. S. C., Tit. 46, Sec. 812). Carriers are required by Section 15 to file with the Board all agreements fixing or regulating rates, giving special rates, accommodations, or privileges. The Board is authorized to disapprove, cancel, or modify any such agreement which it finds to be unjustly discriminatory or in violation of the terms of the Act (U. S. C., Tit. 46, Sec. 814). Section 16 makes it unlawful for any carrier to give any undue or unreasonable preference to any particular person, locality, or traffic. It also makes it

unlawful to allow any person to receive transportation of property at less than the regular rates established and enforced by the carrier (U. S. C., Tit. 46, Sec. 815). The charging or collection of any rate by carriers in foreign commerce which is unjustly discriminatory between shippers or ports, or unjustly prejudical to exporters of the United States as compared with their foreign competitors, is prohibited by Section 17 and the Board is authorized to require the discontinuance of such discriminatory rates (U. S. C., Tit. 46, Sec. 816).[2]

Section 21 was intended to enable the regulatory authority to obtain information which could be used to aid in the enforcement of the regulatory provisions summarized above. The order under attack, far from being a usurpation of authority, was issued for the very purpose contemplated by

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[2] Each of the sections whose provisions are summarized above is applicable to carriers engaged in foreign commerce. Sections 14, 15, and 16 apply to every "common carrier by water." That term is defined by Section 1 (U. S. C., Tit. 46, Sec. 801) to mean "a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port." Section 17 applies to every "common carrier by water in foreign commerce." That term is defined by Section 1 to mean "a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade." It is provided that a cargo boat commonly called an ocean tramp is not a common carrier by water in foreign commerce.

Section 21. It is not necessary to look beyond the face of the statute to see that the information requested by the order would materially assist the Secretary in enforcing the regulatory provisions summarized above. The order itself recites that the information requested "is necessary to the proper administration of the regulatory provisions" of the Act and this statement of purpose is confirmed by the affidavits submitted by the appellees in the court below.[3]

The explicit authorization of Section 21 precludes any argument that the Act by its terms does not authorize the order now under attack. Indeed, of all the arguments advanced by appellant in support of its contention that the order is unauthorized, only one rests in any degree upon the language of the Act, and that contention is so flimsy that it does not require extended discussion. The appellant urges that Section 21 was intended "merely

[3] See Record, pp. 37–44. The affidavits summarize the regulatory duties imposed upon the Secretary by the Shipping Act. It is explicitly stated that one of the purposes for which the order was issued was to determine "whether or not the complainant was in fact maintaining a schedule of rates which were applicable on equal terms to all shippers or whether the complainant was charging different rates to different shippers for transportation of the same classification of freight" (R. 40).

The affidavits also contain explanatory statements with respect to the policies of the Department of Commerce. These statements do not purport to explain the reasons for the issuance of the order under attack. See pp. 24–25, *infra*.

to grant to the Board subpoena power for production of records, reports, information, etc." to be exercised in hearings upon complaints concerning violations of the Shipping Act (appellant's brief, p. 29). A complete answer to this contention is found in the fact that Section 27 of the Shipping Act explicitly authorizes the Shipping Board to issue subpoenas to compel the attendance of witnesses and the production of books, papers, and documents in hearings held to determine alleged violations of the Act (U. S. C., Tit. 46, Sec. 826). Congress would not have enacted Section 27 if it had shared appellant's views as to the meaning of Section 21. Elementary canons of statutory construction prohibit the adoption of a construction of Section 21 which artificially restricts and limits the clear import of its terms so as to make the section merely repetitious of Section 27.

The remaining contentions which appellant makes in support of its position that the order was not authorized by the Shipping Act do not rest upon the language of the Act but rather upon pure assumptions, entirely without foundation, as to the supposed purpose of the order and as to the motives which it is alleged prompted the Secretary to make it. So far as these contentions rest upon assumptions as to the purpose of the order, they are refuted by the provisions of the Act, by the plain terms of the order, and by the affidavits submitted by the appellees in the court below; so far as these

contentions rest upon assertions and conjectures as to the motives of the Secretary, they are unwarranted in fact and, in any event, furnish no basis for the relief which appellant seeks.

The argument upon which appellant appears largely to rely is that the order is an illegal attempt "to regulate or stabilize freight rates in foreign commerce" (appellant's brief, pp. 27–31).[4] This contention finds no support in the terms of the order, which does not purport to control or regulate rates in any way, but merely requires the appellant to file certain information with respect to rates which it has charged in a limited period in the past. If the contention has any basis whatsoever, it must be found in facts and circumstances extraneous to the order which are strong enough to overcome the clear purport of its terms. No such facts or circumstances exist or are alleged.

Appellant assumes that the necessary effect of the Secretary's order must be to regulate and stabilize freight rates. This is an assumption which finds no support in the order, in the vague and general allegations of the complaint, or in appel-

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[4] A part of appellant's brief is devoted to proving that the Secretary of Commerce had no general power to prescribe freight rates in foreign commerce (appellant's brief, pp. 28–29). This is beside the point because the order is not an attempt to exercise any such general authority. It should be noted, however, that although the Shipping Act conferred no general authority to fix rates, Sections 14, 16, and 17 of the Act did prohibit rebates and discriminatory rates and to that extent authorized the regulation of rates.

lant's affidavits. The order does not prevent the appellant from charging any rates which it chooses to charge.[5] To the extent that appellant's freedom to fix its own rates is restricted, that restriction is imposed by other provisions of the Shipping Act such as those which forbid discriminatory practices, and the order now under attack does not attempt to enforce these provisions against appellant. The rates which appellant has charged in the past, and with respect to which it is required to report, were fixed by the appellant by its own volition and without any interference by the Secretary. The fact that the appellant must file these rates and that this information will be made public does not prevent the appellant from fixing and charging other and different rates in the future. In short, if the

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[5] The appellant attempts to support its suggestion that the necessary effect of the order would be to regulate rates by quoting from the opinion of this Court in *Sugar Institute, Inc.*, v. *United States*, 297 U. S. 553 (appellant's brief, p. 27). The passage from the Court's opinion quoted by appellant does not support the suggestion that the necessary effect of filing information with respect to rates is to regulate rates. The appellant ignores the fact that in that case the practice condemned was not the filing of information with respect to prices and terms but "*the steps taken to secure adherence, without deviation, to prices and terms thus announced*", 297 U. S. at p. 601. [Italics supplied.]

The quotation is pertinent, however, in another connection which is not helpful to appellant's case. The quotation shows that the publication of rates tends to discourage discriminatory concessions. Such concessions are prohibited by the Shipping Act and the Secretary's order thus appears to be a reasonable and appropriate incident of his power to enforce that prohibition.

order is enforced, the power of appellant to fix its own rates will be as free and untrammeled as it was on the date when the order was first issued.

The appellant contends also that the order of the Secretary was illegal because it was issued for the purpose of benefiting carriers who belong to certain steamship conferences and of compelling appellant to join such a conference (appellant's brief, pp. 30–31). In making this contention, the appellant completely abandons any attempt to rely upon the language of the Shipping Act or upon the terms of the order, and seeks support in assertions and conjectures as to the Secretary's state of mind at the time the order was made. So far as the bill of complaint is concerned, appellant alleges no facts which support these conjectures and assertions but on the contrary relies upon vague and general allegations which are nothing more than conclusions of fact and law and are entitled to no weight whatsoever.

Putting aside for the moment, however, the question of the truth of these assertions and conjectures, they do not possess the legal relevance which appellant attributes to them. The issuance of the order was clearly authorized by Section 21. The regulatory provisions of the Shipping Act, and the terms of the order, show on their face that the order serves a proper regulatory purpose. This being so, the Secretary's state of mind when he made the order is immaterial. An administrative order authorized by law and designed to serve

a legitimate regulatory purpose should not be enjoined on the basis of assertions and speculations about the subjective state of mind of the officer who issued it. Nor should such an order be invalidated on the sole ground that although the officer who made it remained strictly within the limits of his statutory authority and although the order is otherwise legal, it was prompted by motives whose wisdom might be questionable. This Court has said that it will not consider the motives of an executive officer in performing a discretionary act which lies within the scope of his authority. *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, 184. *Cf. Philadelphia & Trenton R. R. Co.* v. *Stimson*, 14 Pet. 448, 458–459. It has also said that it will not question the validity of reasons stated in an administrative order. *United States* v. *Chemical Foundation*, 272 U. S. 1, 15. *Cf. Highland* v. *Russell Car Co.*, 279 U. S. 253.

But even if appellant's charges were relevant they are unfounded. As has already been pointed out, appellant's assertion that the order was not issued for a public purpose is a legal conclusion unsupported by adequate allegations of fact, and is entitled to no consideration. The bill of complaint alleges no specific acts of the Secretary which indicate that he ever sought to induce appellant to become a member of a steamship conference. There is no allegation of any specific acts of the Secretary intended to injure the appellant

in its business. Even if the appellant were permitted to resort to the affidavit of its president (R. 23–27) to supply the deficiencies of the complaint that affidavit contains no statement of evidence which could indicate any illegal or improper motive of the Secretary.[6] The assertion in the affidavit that the order was issued at the instance of competitors of appellant (R. 24) is entirely consistent with the conclusion that the investigation was undertaken as the result of informal information concerning the trade practices of appellant made to the Secretary.[7]

Despite the contrary assertions of appellant, the affidavits submitted on behalf of the appellees in the court below contain a complete denial of any

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[6] An affidavit filed in support of an application for a preliminary injunction cannot be considered in determining whether the complaint states facts sufficient to constitute a ground for relief. *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249, 253.

The statement in the affidavit that the purpose of the investigation was "to benefit" the conference lines falls short of appellant's assertion in the brief that the affidavit shows that the order was issued "only for the purpose of turning over the information" to two of complainant's competitors (appellant's brief, p. 13).

[7] It is clear that if an informal complaint were presented to the Secretary and the complainant did not seek to initiate formal proceedings under Section 22 of the Act with a view to obtaining reparation, the Secretary, on his own initiative, would have the power to conduct an investigation under Section 21 to determine whether appellant was in fact engaging in discriminatory practices forbidden by the Act.

improper purpose (R. 37–44).[8] They confirm the recital of the order that it was issued in aid of the lawful regulatory powers of the Secretary (R. 40) and they negative the inference that it is the design of the Secretary to induce appellant to join any conference, or that it is the purpose of the Secretary to injure appellant in its business. In this connection it should be pointed out that appellant, in its brief, in an attempt to support its charges that the Secretary was actuated by improper motives, misconstrues a number of the allegations found in these affidavits. In addition to specifying the particular reasons which led to the issuance of this order, the affidavits contain general explanatory statements with respect to the activities of the Secretary of Commerce, and the policies followed by the Department of Commerce, in administering the duties originally conferred upon the Shipping Board. Many of these statements were responsive to irrelevant assertions found in the bill of complaint. These general statements do not specify the reasons for the issuance of the order now under attack nor do they support appellant's

[8] For the purpose of the motion to dismiss the affidavits submitted by the appellees below cannot, of course, be used to negative any direct and relevant allegations of the bill of complaint. Inasmuch, however, as the appellant in its brief (see particularly pages 33–40) has attempted to use these affidavits to show that the order was unauthorized and unreasonable, it is appropriate in this brief to explain the meaning of the statements contained in those affidavits and the significance which should be attached to them.

assertion that the Secretary was prompted by evil or improper motives when he made it. They show on their face that they are not capable of the construction which appellant seeks to put upon them.[9]

Appellant's argument rests on certain misconceptions as to the nature of the conferences and the relation of the Secretary thereto. The conference agreements which are attacked as "combinations formed by certain shipowners for a selfish and monopolistic purpose" (appellant's brief, p. 30) are agreements between groups of steamship operators made pursuant to the explicit sanction of Section 15 of the Shipping Act, 1916 (39 Stat. 733, U. S. C., Tit. 46, Sec. 814). That section provided that agreements entered into by carriers subject to the Act for the purpose of regulating rates and trade practices should be filed with the Ship-

[9] For example, in the affidavit of Harry S. Brown it is stated that "the experience of the Government has been that the existence of the conference agreements results in greater stabilization of rates and practices affecting foreign commerce and that shippers are greatly aided thereby in being able to quote prices for future delivery by reason of knowing what the freight rates will probably be in the future" (R. 41). Appellant's brief construes this statement as a specification of one of the grounds upon which the Secretary's order was based (appellant's brief, p. 35). This is neither the purpose nor the meaning of the statement. It was obviously intended to explain why the Secretary, in the exercise of the authority conferred upon him by the Shipping Act, had approved certain conference agreements and was responsive to irrelevant assertions made by appellant with respect to the evils and the illegality of the conference agreements.

ping Board. The Board was authorized to disapprove, cancel, or modify any agreement which it finds to be unjustly discriminatory or unfair "as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States", or to be in violation of the prohibitions contained in the Shipping Act. Such agreements, when approved by the Board, were explicitly excepted from the operation of the antitrust laws. Despite appellant's allegation that the Secretary has a "partisan" interest in such conferences (appellant's brief, p. 30), the record shows clearly that he is concerned only in scrutinizing such agreements to ascertain that they do not violate the Shipping Act and that they do not result in a monopoly which prevents other carriers from engaging in business in competition with the members of those conferences (R. 41).[10]

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[10] It is alleged that "any power of rate regulation in foreign commerce would be inconsistent with the duties of a partisan nature imposed by Congress on the Shipping Board so far as foreign commerce is concerned" (appellant's brief, pp. 29–30). This contention is obviously based upon the unfounded assumption that the Secretary has endeavored to fix rates for the carriage of freight in foreign commerce. The regulatory duties imposed by the Shipping Act are in no way inconsistent with what appellant calls the duties of a "partisan nature." Those "partisan" duties consist of the protection of the proprietary interests of the

Appellant asserts that such conferences seek to drive independent steamship companies out of business or to compel them to join conferences (appellant's brief, p. 30). Activities directed to that end would constitute a clear violation of Sections 14 (39 Stat. 733; 41 Stat. 996; U. S. C., Tit. 46, Sec. 812) and 16 (39 Stat. 734; U. S. C., Tit. 46, Sec. 815) of the Shipping Act. If appellant is injured by such practices, it may file a complaint under Section 22 of the Shipping Act (39 Stat. 736; U. S. C., Tit. 46, Sec. 821), and, after a hearing upon its complaint, it may recover full reparation for the injuries it has sustained. Nowhere in the bill of complaint or in appellant's brief is it stated that appellant has ever filed such a complaint concerning practices of the conference steamship lines. In the absence of the employment of this administrative remedy appellant is not entitled to the judicial relief which it seeks in this case. *U. S.*

United States in a small number of vessels which remain of those acquired during the World War, through the supervision of the private operators by which such vessels have been operated (R. 43–44). While such vessels are operated in competition with steamships operated by foreign companies, every effort is made to avoid competition with vessels operated by citizens of the United States (R. 44). It is apparent that this supervisory authority in no way conflicts with the duty to prevent rate discrimination in violation of the Shipping Act.

It should be noted that these so-called "partisan" duties were part of the functions of the original Shipping Board.

Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474, 486–487.[11]

B. THE ORDER OF THE SECRETARY DOES NOT AMOUNT TO AN ATTEMPTED UNREASONABLE SEARCH AND SEIZURE

The appellant contends that the Secretary's order amounts to an attempted unreasonable search and seizure (appellant's brief, pp. 32–42). The appellees submit that the constitutional prohibition against unreasonable search and seizure has no application in the instant case. As the language of the Fourth Amendment clearly indicates, that prohibition was intended to protect the citizen against search and seizure or compulsory production of his books and papers.[12] The order under attack merely requires appellant to furnish

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[11] The decision of this Court in *Thomsen* v. *Cayser*, 243 U. S. 66, upon which appellant relies to establish the illegality of conference agreements, has no application here (appellant's brief, p. 31). In that case suit was instituted under the Sherman Act by a shipper to recover treble damages for injuries sustained through rate discrimination practiced by a combination of steamship companies in restraint of foreign trade. The combination involved was formed prior to the passage of the Shipping Act, and was not a conference authorized by the provisions of Section 15 of the Shipping Act, 1916, or approved by the Shipping Board.

[12] In *Olmstead* v. *United States*, 277 U. S. 438, the purpose of the Fourth Amendment was described in these words (p. 463):

"The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a *man's house, his person, his papers, and his effects; and to prevent their seizure against his will.*" [Italics supplied.]

certain specified information. The order may be the equivalent of interrogation under oath, but it does not call for the production or inspection of appellant's books or papers. If the order was unauthorized by the Shipping Act it would doubtless be illegal, but its illegality would consist in a lack of statutory authority and not in a violation of the search and seizure provision of the Fourth Amendment. *Olmstead* v. *United States,* 277 U. S. 438. *Cf. Bilokumsky* v. *Tod,* 263 U. S. 149, 155.[13]

Quite apart from this consideration, appellant's argument that the order is an unreasonable search and seizure is without merit. The principal basis for the argument appears to be that there is "no legitimate ground" for the order (appellant's brief, pp. 32–42). This is merely a restatement of

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[13] In *Olmstead* v. *United States*, 277 U. S. 438, this Court held that the tapping of telephone wires which involved no trespass upon property of the defendants, was not a search and seizure within the meaning of the Fourth Amendment. The Court said (p. 466):

"Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure."

Cf. *Bilokumsky* v. *Tod*, 263 U. S. 149, where this Court said (p. 155): "But mere interrogation under oath by a Government official of one lawfully in confinement is not a search and seizure."

the contention that the order was not authorized by the provisions of the Shipping Act. It has been shown on pages 13–28, *supra*, that this contention is groundless and that the order is clearly authorized by the provisions of Section 21 of the Act and is a reasonable and appropriate method of obtaining information to aid in enforcing the valid regulatory provisions contained in other sections of the Act. Cases such as *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, and *Jones* v. *Securities Exchange Commission*, 298 U. S. 1, which relate to investigations undertaken without express statutory authorization, are consequently not in point.

The appellant's suggestion that the order is the kind of sweeping demand for information and for the production and inspection of papers which has been disapproved by this Court in such cases as *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, and *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, is without foundation. In those cases blanket demands were made for the inspection of papers and records irrespective of their relevance and without regard to the existence of statutory authority to regulate the subject matter with respect to which the information was requested.

The order in the instant case is of a different character. It does not call for any production or inspection of appellant's private books and papers, much less for a blanket production or inspection.

It does not require the appellant to disclose trade secrets, the names of its customers, or any other information whose disclosure might injure appellant in its business. It merely requires the appellant to furnish a list of freight rates actually charged over a limited period of time. The issuance of the order was authorized by Section 21 of the Shipping Act and the order relates to matters subject to regulation under that Act.

Even if it is assumed that the Fourth Amendment is applicable in the instant case, an order based upon explicit statutory authorization and requesting particular and limited information germane to matters subject to regulation by the authority issuing the order does not constitute an unreasonable search and seizure. This Court has held that a demand of the Interstate Commerce Commission for the production of documents and the making of reports which are relevant to a subject which lies within its investigative power does not constitute an unreasonable search and seizure. *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 45–46; *Cf. Baltimore & Ohio R. R.* v. *Interstate Commerce Commission,* 221 U. S. 612, 622; *Flint* v. *Stone Tracy Co.,* 220 U. S. 108, 177. In *Baltimore & Ohio R. R.* v. *Interstate Commerce Commission,* the Court sustained an order requiring carriers to make monthly reports under oath, showing the instances where employees subject to the Interstate Commerce Act had been on duty for

a longer period than that allowed by the Act. This Court said (p. 622):

> The order of the Commission is suitably specific and reasonable, and there is not the faintest semblance of an unreasonable search and seizure. The Fourth Amendment has no application.

The order of the Secretary involved in this case is quite as reasonable and specific as the order challenged in *Baltimore & Ohio R. R.* v. *Interstate Commerce Commission* and should be sustained for the reasons stated in the language just quoted.

C. THE ORDER OF THE SECRETARY DOES NOT UNLAWFULLY DISCRIMINATE AGAINST THE APPELLANT

The order of the Secretary is directed to the appellant alone. An order directed to a single carrier is clearly authorized by the provisions of Section 21. That Section contemplates that there may be occasions when its purposes will best be served by requiring information from a particular carrier rather than from all carriers subject to the Act. The exertion of the authority thus conferred and the issuance of an order to a single carrier does not violate the due process clause of the Fifth Amendment. That clause does not require rigid and absolute equality of treatment; it does require that the differences in treatment shall not be arbitrary but shall rest on a reasonable basis.[14] In this case there was a reasonable and proper basis for the Secretary's order.

Although the bill of complaint may be construed as alleging that appellant is the only carrier to whom an order directing the filing of rates actually charged has been issued under Section 21 of the Shipping Act (R. 15), the bill of complaint does not allege that appellant is the only carrier who has been required to file information with respect to its rate schedule. The reason why the order involved in this case was directed only to the appellant is disclosed in the affidavit of Harry S. Brown, Chief of Division of Regulation of United States Shipping Board Bureau, Department of Commerce (R. 40):[15]

> By reason of the fact that all other common carriers engaged in foreign commerce by water have filed all the necessary information by filing their schedules of rates, there has been no necessity to issue an order to them under Section 21 of said Shipping Act, 1916.

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[14] *Cf.* such cases as *Denver* v. *New York Trust Co.*, 229 U. S. 123, 143, and *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–79, construing the equal protection clause of the Fourteenth Amendment.

[15] It is conceded that for the purposes of the motion to dismiss, the affidavit of Mr. Brown cannot be used to negative any direct allegations of the bill of complaint. Inasmuch as appellant in its brief, however, has discussed Mr. Brown's affidavit in some detail in an attempt to show that the Secretary's order was improper and unreasonable, reference is made to the affidavit for the purpose of showing that appellant's construction of the statements contained therein is unjustified.

Appellant does not dispute that the other carriers subject to the Act have filed information with respect to their rates.[16] On the contrary it affirmatively appears on the face of the bill of complaint that appellant's competitors have filed information substantially similar to that required by the order under attack. In paragraph 31 of the complaint it is alleged that the order discriminates against the appellant because it requires the appellant "to file actual rates charged by it on particular goods between named ports, whereas the only order issued by the defendants to complainant's competi-

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[16] It appears that section 15 of the Shipping Act has been interpreted as requiring those competitors of appellant which are members of the steamship conference to keep on file with the Secretary not only their regular rates but also any special rates or charges (R. 39).

It should be noted that the statements in the affidavit of Harry S. Brown with respect to the filing of tariffs are not confined to those carriers which are members of conferences but cover all carriers engaged in foreign commerce except appellant (R. 39–40).

The competitors of appellant may also be required to file information from time to time under Section 21 of the Shipping Act. It is significant that although the appellant complains that the Secretary has not issued orders to other carriers under the provisions of Section 21, it does not allege that any of its competitors are engaging in discriminatory practices prohibited by the Act and that the Secretary has improperly refrained from exercising his powers under Section 21 with respect to such competitors. In the absence of such an allegation appellant has no basis for its charge of arbitrary discrimination. *Mackay Telegraph Co.* v. *Little Rock*, 250 U. S. 94, 100; *Lieberman* v. *Van De Carr*, 199 U. S. 552, 563; *Ah Sin* v. *Wittman*, 198 U. S. 500, 507–508.

tors, the said Conference Lines, requires merely the filing of general rate schedules which are not always adhered to and which need not be adhered to under any law or government regulation" (R. 15). The gist of appellant's complaint seems to be not that it has been compelled to disclose, while its competitors have been permitted to remain silent, or that it has been required to disclose one kind of information while its competitors have been permitted to disclose another, but that its competitors have not been compelled to adhere to the rate schedules which they have filed (R. 15). The affidavit of Harry S. Brown, submitted in behalf of appellees, shows that this complaint is unfounded,[17] but assuming for the moment that appellant's assertion is correct, the conclusion that this constitutes illegal discrimination is unwarranted. The order directed the appellant to file schedules of rates which had been charged in the past. The appellant fixed those rates without interference by the Secretary. The complaint does not allege that past deviations by appellant's competitors from the rates filed with the Secretary injured appellant

[17] See particularly record 39–40, where it is stated that the rates and schedules filed by appellant's competitors "were those which were effective September 1, 1935, and were to remain effective until changes were made therein by the respective common carriers, and the respective common carriers, upon making any changes in said schedules, within 30 days of the effectiveness of any such change, are filing notice of the said change with the Secretary of Commerce."

in any way in the past and, in any event, such injury affords no basis for the injunctive relief which appellant now seeks.[18] So far as the future is concerned, enforcement of the Secretary's order will not limit or restrict the right of the appellant to deviate from the rates which are filed. Its freedom of action is certainly no less than that of its competitors and may well be more.[19]

In a situation such as the present where appellant is the only carrier in foreign commerce who has refused to file voluntarily with the Secretary information with respect to its rates, it is not unreasonable or arbitrary for the Secretary to issue an order, pursuant to the provisions of Section 21, which is directed to the appellant alone. The issuance of similar orders to other carriers is unnecessary and would serve no useful purpose. If appellant chooses to place itself in a category different from that of all the other carriers by refusing to voluntarily file information with respect

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[18] If appellant has suffered such an injury, a remedy is provided by the provisions of Section 22 of the Shipping Act, and, as it has been pointed out above, appellant is not entitled to maintain this suit until it has exhausted the administrative remedy provided by that Section.

[19] When a schedule of rates is filed as a part of a conference agreement made pursuant to the provisions of Section 15, it can be modified only with the approval of the Secretary.

See also the affidavit of Harry S. Brown referred to above, where it is stated that all of the carriers engaged in foreign commerce, except appellant, give the Secretary 30 days' notice of any change in their rate schedules (R. 40).

to its rates, it cannot object if the Secretary accords it somewhat different treatment. The allegations of the bill of complaint fail to substantiate appellant's contention that the order involves a difference in treatment which is arbitrary or unreasonable or violates appellant's constitutional rights.

The refusal of the Secretary to accede to appellant's insistence that any rate information filed by it be kept secret provides no evidence of arbitrary discrimination against appellant. The bill of complaint does not allege that appellant is not entitled to inspect the rate information filed by other carriers. In fact all rate schedules filed by other carriers are given full publicity and may be inspected by appellant at any time (R. 39). The Shipping Act does not require the Secretary to treat as confidential any data received by him in the exercise of his investigative power. In the absence of such direction it is not to be presumed that Congress intended that such information should be kept in secrecy. This conclusion is strengthened by the fact that in Section 20 Congress did provide that no carrier shall disclose certain confidential information.[20]

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[20] Section 20 provides that no carrier shall disclose confidential information concerning the kind, quality, consignee, or routing of any property delivered to it for transportation, where such information might be used to the detriment of the shipper or the consignee, or which might disclose his business transactions to his competitors. It requires also

II

CONGRESS AUTHORIZED AND SUBSEQUENTLY RATIFIED AND APPROVED THE ABOLITION OF THE SHIPPING BOARD AND THE TRANSFER OF ITS FUNCTIONS TO THE DEPARTMENT OF COMMERCE

The appellant contends that even if it is assumed that the Shipping Board, acting pursuant to the provisions of the Shipping Act, might properly have issued the order involved in the instant case, the Secretary of Commerce had no legal authority to do so because Executive Order 6166 which abolished the Shipping Board and transferred its functions to the Department of Commerce was never authorized by Congress. This argument rests on the premise that Title IV, under which the executive order was made, did not authorize the reorganization of an administrative board or commission like the Shipping Board. If there ever was a time when this contention possessed merit, that time has passed, because by the Act of June 29, 1936, c. 858, 49 Stat. 1986, known as the Merchant Marine Act, 1936, Congress recognized and ratified the abolition of the Shipping Board and the transfer of its functions to the Secretary of Commerce by the executive order in question. See pp. 52–53, *infra*.

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that no carrier shall disclose such information if it might be used to the detriment of any carrier. The section does not intimate that all information shall be kept in secrecy by the Shipping Board (U. S. C., Tit. 46, Sec. 819).

In view of this fact, the intent of Congress when it enacted Title IV of the Legislative Appropriation Act of June 30, 1932, has ceased to be of paramount importance and appellant's contentions with respect to that intent have now merely an academic interest. The appellant, however, in disregard of the Merchant Marine Act, 1936, continues to press its contentions with unabated vigor. The merits of these arguments will therefore now be briefly considered.

A. TITLE IV AUTHORIZED THE ABOLITION OF THE SHIPPING BOARD AND THE TRANSFER OF ITS FUNCTIONS TO THE DEPARTMENT OF COMMERCE

Title IV was enacted pursuant to the declared policy of Congress to reduce expenditures and to increase efficiency in government by coordinating executive and administrative agencies.[21] Section 403 of the Act, which confers the authority exercised by the President in issuing Executive Order 6166, provides in part as follows:

> SEC. 403. Whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies and/or the functions thereof is necessary to accomplish any of the purposes set forth in section 401 of this title, he may by Executive order—

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[21] The declaration of policy is found in Section 401 of Title IV. See appendix, pp. 88–89, *infra*.

> (a) Transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency;
>
> (b) Consolidate the functions vested in any executive agency; or
>
> (c) Abolish the whole or any part of any executive agency and/or the functions thereof; and
>
> (d) Designate and fix the name and functions of any consolidated activity or executive agency and the title, powers, and duties of its executive head; except that the President shall not have authority under this title to abolish or transfer an executive department and/or all the functions thereof.

The issue raised by appellant's contention is whether the term "executive agency" used in Section 403 covers such an agency as the Shipping Board. Section 402 defines the term "executive agency" as follows:

> When used in this title, the term "executive agency" means any *commission, independent establishment, board, bureau,* division, service, or office in the executive branch of the Government and, except as provided in section 403, includes the executive departments. [Italics supplied.]

The intent of Congress is primarily to be determined from the words which it has used. *Thompson* v. *United States,* 246 U. S. 547, 551. *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 46–47. The language of Section 402 is wide in scope and unambiguous

in import. Any one of the terms "commission", "independent establishment", or "board", taken alone, aptly and accurately describes the Shipping Board. Unless some unexpressed but implied limitation is to be read into the words of Section 402, they are broad enough to include the Shipping Board within their scope.[22]

If doubt were possible as to whether the language of Section 402 was intended to cover such an agency as the Shipping Board, that doubt would be removed by the legislative history of Title IV. When the statute was first enacted in 1932 it did not authorize the abolition of such an agency as the Shipping Board; Section 406 expressly provided that the President should have no authority to abolish agencies created by statute. *When the Act was amended in 1933, this prohibition was omitted.*[23] The change in the language of the stat-

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[22] The wide scope intended for Section 402 is also indicated by Section 401 which directed the President to investigate "*all executive and administrative agencies of the Government*" and to "determine what changes therein are necessary." [Italics supplied.] There is no qualifying language in this section to indicate that any administrative or executive body was to be excepted.

[23] The 1933 amendment also made a significant change in the definition of "executive agency." In its original form Section 402 distinguished between "*executive agency*" and "*independent executive agency*", the latter words being defined as covering "any executive agency not under the jurisdiction or control of any executive department." By abandoning this distinction between executive agencies and *independent* executive agencies and including *independent*

ute must be taken as an indication of a change in congressional intent. *Cf. Brewster* v. *Gage*, 280 U. S. 327, 337; *Johnson* v. *United States*, 225 U. S. 405, 415; *Crawford* v. *Burke*, 195 U. S. 176, 190. The omission from the statute of the limitation originally contained in Section 406 creates a presumption that the purpose expressed in that limitation was abandoned. See *Pirie* v. *Chicago Title and Trust Co.*, 182 U. S. 438, 448; *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 537.

Support for the view that Congress intended the amended statute to authorize the abolition or transfer of the functions of agencies such as the Shipping Board is found in the debates which preceded the passage of the amendment. The following significant colloquy with respect to the scope of Section 402 took place in the Senate (Cong. Rec., Vol. 76, Pt. 4, p. 3538):

> Mr. La Follette. I should like to ask the Senator two questions concerning the amendment. One is with regard to section 402, as to whether or not the Senator interprets that language to include the Federal Trade Commission, the General Accounting Office, and the Interstate Commerce Commission.

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establishments within the scope of the term "executive agency" the 1933 amendment showed a clear intent to extend the meaning of the term "executive agency" to cover independent agencies not normally subject to exclusive executive control.

> Mr. BYRNES. Under the definition of "Executive agencies" it would include all of the commissions and departments of the Government except the executive departments.

It is also significant that statements were made in the debates which show that the amendment was intended to confer wider authority on the President than that conferred by the original Act because it was believed that extension of authority was necessary if the purposes of the Act were to be accomplished.[24]

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[24] For example, Representative Ludlow stated (Cong. Rec., Vol. 76, Pt. 5, p. 4603):

> The order given to President Hoover was no such proposal as the one now before us. It did not grant him authority to abolish one solitary governmental agency of any kind. About all his plan amounted to, therefore, and about all it could amount to, was to play solitaire with the bureaus and and commissions, moving them from one place to another, regrouping and rearranging them; but it did not abolish a bureau, fire a bureaucrat, or save a dollar. The House wisely followed the advice of Colonel Roop, the Director of the Budget, and put the matter over until the Congress could vest in the President broader powers that would enable him to do the job as it should be done.
>
> The result of a further consideration of the problem by the Congress is the proposition now before us which gives to the President-to-be plenary powers to reorganize the Government, stopping only short of the power to abolish entire departments, with certain reservations which will enable Congress, by the two-thirds required to override a veto, to defeat any reorganization plan the President may present pursuant to the terms of the act. My only objection to the plan is that it does not go quite far enough. I would give the President power also to abolish departments.

Appellant insists that the qualifying phrase "in the executive branch of the Government" excludes the Shipping Board from the scope of Section 402 because the Board was authorized to perform certain quasi-judicial and quasi-legislative duties and hence could not be regarded as being in the executive branch of the government (appellant's brief, p. 42). Appellant seeks to support this artificial and strained interpretation of Section 402 by citing *Humphrey's Executor* v. *United States,* 295 U. S. 602 (appellant's brief, pp. 42, 44). That decision has no application in the instant case. In that case this Court held that a congressional restriction on the presidential power of removal, which was invalid in the case of an official like a postmaster, was constitutional as respects a member of the Federal Trade Commission.[25]

Assuming for the moment that the Federal Trade Commission and the Shipping Board are similar in all respects, the decision in *Humphrey's*

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[25] The Court stated (295 U. S. 602, 631–632):

"The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute."

Executor v. *United States,* 295 U. S. 602, does not support the proposition that because an agency is not subject to exclusive executive control as respects the power of removal it can never be regarded as a part of the executive branch of the government, or that when Congress uses the words "any commission, independent establishment, board, bureau * * * in the executive branch of the Government" it must be presumed to have intended to exclude from their scope all agencies not subject to such exclusive executive control.[26] Long ago this Court in *Kendall* v. *United States,* 12 Pet. 524, 610, pointed out that an officer in the executive department of the government may in some respects be subject to the control of the legislature:

> The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. *But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President.* Such a principle, we apprehend, is not, and certainly cannot be claimed by the President. There are cer-

[26] The fact that Congress expressly included *independent establishments* in the definition of the words "executive agency" indicates that Congress intended Title IV to cover agencies such as the Federal Trade Commission which are not normally subject to exclusive executive control.

> tain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; *and in such cases, the duty and responsibility grow out of, and are subject to the control of the law, and not to the direction of the President.* [Italics supplied.]

Nor does the fact that an agency or an officer may perform certain quasi-judicial or quasi-legislative functions mean that the agency or officer can never be regarded or described as a part of the executive branch of the government.[27] The Secretary of Agriculture, for example, performs certain quasi-judicial and quasi-legislative duties pursuant

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[27] It is true that in *Humphrey's Executor* v. *United States*, 295 U. S. 602, 628, 630, this Court referred to the Federal Trade Commission as "an agency" of the legislative and judicial departments. It would appear, however, that this language was intended to describe the character which the Commission assumes when it discharges its quasi-legislative and quasi-judicial duties, and that it was not intended to commit this Court to the view that the Federal Trade Commission could never, under any circumstances or for any purpose, be described as falling within the executive branch of the government. It may be said that when an executive officer exercises quasi-legislative power properly delegated to him by Congress he is acting as an agency of Congress, but that would not preclude description of the officer as a member of the executive department of the government.

to the provisions of the Packers and Stockyards Act and the Grain Futures Act, and in connection with the administration of the forest reserves. See *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *United States* v. *Grimaud*, 220 U. S. 506. The duty imposed upon the Secretary of Labor by the Act of June 30, 1936, c. 881, 49 Stat. 2036, of determining minimum wages to be paid by government contractors is a quasi-judicial or quasi-legislative duty. The same officer is required by the Act of March 3, 1931, c. 411, 46 Stat. 1494, as amended, to determine the prevailing wage rate in a community in which public works are being constructed for the purpose of fixing the wages to be paid on those works—a duty which is also quasi-judicial or quasi-legislative in character. The Commissioner of Patents performs certain quasi-judicial and quasi-legislative functions. The Secretary of the Interior performs similar duties in connection with the administration of the public lands. The Rivers and Harbors Act of 1899 (c. 425, 30 Stat. 1151) conferred certain quasi-legislative and quasi-judicial powers upon the Secretary of War in connection with the legalization of obstructions in navigable streams. (See *Union Bridge Co.* v. *United States*, 204 U. S. 364.)

It has never been suggested, either before or after the decision in *Humphrey's Executor* v. *United States*, 295 U. S. 602, that the officers re-

ferred to above are not members of the executive branch of the government.[28]

The words "in the executive branch of the Government" used in Section 402 were not intended to describe merely agencies and officers subject exclusively to executive control and all of whose duties are purely executive in nature; on the contrary, the words were used in a generic sense to describe all agencies and officers except those which may properly be described as belonging either to the legislative or the judicial branch of the government. The Shipping Board could hardly be described as belonging to both the judicial and legislative branches of the government, and to describe it as belonging exclusively to one or the other of those branches produces a result which is patently incongruous. Indeed, appellant stops short of contending that the Shipping Board can properly be described as belonging exclusively either to the legislative or judicial branches of the government. It seems to suggest, however, that the historic theory that the government provided by the Constitution consists of three branches, the executive, the legislative, and the judicial, is incorrect, or at least incomplete, and that there is a fourth and different

[28] It should be noted that in *Morgan* v. *United States*, 298 U. S. 468, 480, decided after *Humphrey's Executor* v. *United States*, 295 U. S. 602, this Court stated that when the Secretary of Agriculture, pursuant to authority conferred upon him by the Packers and Stockyards Act, acts to fix the rates charged by market agencies, he acts in a "quasi-judicial" capacity.

branch, separate and distinct from the other three, which can only be aptly described by the use of such compound adjectives as quasi-legislative and quasi-judicial. This hybrid creature which the appellant evokes for the purpose of defeating the manifest intent of Congress, as expressed in Section 402, is unknown to the Constitution and repugnant to long established and commonly accepted theories as to the nature of the federal government. There are only three branches of that government, the legislative, the judicial, and the executive.[29] The Shipping Board was obviously not a part of the judicial or the legislative branches of the government; it follows that it was a part of the executive branch.[30] There is no escape from this conclusion. It may be true that because of

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[29] See the discussion of the doctrine of separation of powers in The Federalist, No. 47. See also the statements of the doctrine contained in *Kilbourn* v. *Thompson*, 103 U. S. 168, 190; *Myers* v. *United States*, 272 U. S. 52, 116; *Williams* v. *United States*, 289 U. S. 553, 581; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629–630.

This is not to say that the words "quasi-judicial" or "quasi-legislative" may not properly be used to describe duties discharged by officers or agencies of the federal government. The point is that there is no fourth division of the government consisting of those officers and agencies which discharge such "quasi-judicial" or "quasi-legislative" duties and the mere fact that an officer or an agency discharges such duties is no basis for asserting that the officer or agency can never be described as belonging to the executive branch of the government.

[30] *Cf. Springer* v. *Philippine Islands*, 277 U. S. 189, 202–203.

certain functions and duties of the Shipping Board the power of the President to remove members of the Board was not exclusive but was subject to restriction and control by Congress, but that circumstance does not affect the position of the Board in the fundamental framework of the federal government. Appellant's contention to the contrary does violence to the expressed intent of Congress and seeks to engraft upon American constitutional law an arbitrary and anomalous doctrine which should be decisively rejected.

Appellant also contends that Section 306 of Title III of the Legislative Appropriation Act of June 30, 1932, indicated a congressional intent to exclude the Shipping Board from the scope of Section 402 (appellant's brief, p. 45). Section 306 of Title III reduced the number of members of the Shipping Board from seven to three, prescribed their term of office, and provided that all laws relating to the Board should remain in full force and effect. The appellant asserts that by these provisions Congress itself "reorganized the Shipping Board and provided for its permanent continuance on an 'economy basis'; and did not delegate to the President any power or duty whatever with respect to it" (appellant's brief, p. 46).

This contention may be summarily disposed of by the observation that when Section 306 of Title III was enacted, Section 206 of Title IV expressly withheld from the President the authority to

abolish or transfer the functions of such an agency as the Shipping Board. It has been explained above that it was the amendment of Title IV in 1933 which first gave to the President the authority to reorganize the Shipping Board. The clear and unequivocal language with which Congress in 1933 conferred this authority upon the President cannot be explained away or limited by doubtful inferences drawn from Section 306 which was adopted in 1932. The later expression of legislative intent must control. The repeal of Section 206 in 1933 removed the only statutory barrier to the reorganization of the Shipping Board. It is unnecessary to consider whether Congress intended to repeal Section 306, because that section by its terms never purported to provide for the permanent existence of the Shipping Board or to qualify or limit in any way the power to reorganize and to consolidate in the interests of economy and efficiency, which was explicitly conferred upon the President by other sections of the statute.[31]

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[31] It may be suggested that the enactment of the Intercoastal Shipping Act, 1933 (c. 199, 47 Stat. 1425), indicated a congressional intent to preserve the Shipping Board. That statute enlarged the regulatory powers of the Shipping Board over intercoastal commerce. It is significant that although this statute was enacted at the same session of Congress as the amendment to Title IV, Congress did not insert in either statute any language indicating that the amendment was not intended to extend the power of the President to the Shipping Board. The fact that the Intercoastal Shipping Act, in enlarging the powers of the Ship-

B. CONGRESS HAS RATIFIED AND APPROVED THE TRANSFER OF THE FUNCTIONS OF THE SHIPPING BOARD TO THE DEPARTMENT OF COMMERCE

It has been shown that Executive Order 6166 was clearly authorized by the provisions of Title IV. Any conclusion which may be reached, however, with respect to the original intent of Congress has ceased to be of controlling importance in this case because Congress in subsequent legislation has approved and ratified the action of the President in abolishing the Shipping Board and transferring its functions to the Department of Commerce.

The latest and most conclusive congressional expression of approval is found in the Act of June 29, 1936, 49 Stat. 1986, known as the Merchant Marine Act, 1936. The statute creates a commission to be known as the United States Maritime Commission, to which are transferred the functions of the Shipping Board Bureau of the Department of Commerce. In Section 204 (a) of the Act it is specifically stated that the functions of the former Shipping Board are "now vested in the Department of Commerce pursuant to Section

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ping Board, mentioned that body by name cannot be construed as an implied expression of intention that the Shipping Board should remain perpetually in existence irrespective of the provisions of Title IV. When the Intercoastal Shipping Act was passed, no action had been taken by the President under Title IV as amended, the Shipping Board was still in existence, and Congress had no basis for determining whether the President would find the Shipping Board to be a proper subject for coordination.

12 of the President's Executive Order 6166."[32] This is a clean-cut recognition and approval of the transfer of the functions of the Shipping Board and precludes any contention that the Secretary's order should now be enjoined because his assumption of the functions of the Shipping Board is without congressional sanction.

The enactment of the Merchant Marine Act was not the first or the only demonstration of congressional approval. Section 407 of Title IV, as amended, required executive orders issued pursuant to its provisions to be transmitted to Congress while in session and provided also that no such

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[32] Section 204 (a) of the Merchant Marine Act, 1936, follows:

"SEC. 204. (a) All the functions, powers, and duties vested in the former United States Shipping Board by the Shipping Act, 1916, the Merchant Marine Act, 1920, the Merchant Marine Act, 1928, the Intercoastal Shipping Act, 1933, and amendments to those Acts, and now vested in the Department of Commerce pursuant to section 12 of the President's Executive order of June 10, 1933, are hereby transferred to the United States Maritime Commission; * * *."

Section 202 of the same Act provides additional evidence of congressional ratification of Executive Order 6166. That section provides:

"SEC. 202. All money, notes, bonds, mortgages, and securities of every kind, contracts and contract rights, lands, vessels, docks, wharves, piers, and property and interests of every kind, owned by the United States, and now controlled by the Department of Commerce as the successor to the powers and functions of the former United States Shipping Board, by virtue of the President's Executive Order of June 10, 1933, are hereby transferred to the Commission."

order should become effective until the expiration of sixty days after its transmission to Congress, unless Congress should provide for an earlier effective date.[33] Executive Order 6166 was transmitted to Congress on June 10, 1933, while Congress was in session (Cong. Rec., Vol. 77, Pt. 6, pp. 5598, 5706–5708).[34] Thereafter, Congress did not either expressly or by implication disapprove of the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce. The obvious purpose of Section 407 was to give to Congress an opportunity to disapprove an executive order whose provisions Congress deemed unwise. The failure of Congress to take advantage of this opportunity to disapprove of Section 12 of Executive Order 6166, considered by itself and quite apart from other circumstances, is tantamount to an expression of approval.

Appellant suggests that the Act of June 16, 1933, c. 101, 48 Stat. 283, should be regarded as a disaffirmance of Section 12 of Executive Order 6166,

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[33] Section 407, as amended (47 Stat. 414; 47 Stat. 1519; 48 Stat. 16; U. S. C., Tit. 5, Sec. 130), provides:

"EFFECTIVE DATE OF EXECUTIVE ORDER

"SEC. 407. Whenever the President makes an Executive order under the provisions of this title, such Executive order shall be submitted to the Congress while in session and shall not become effective until after the expiration of sixty calendar days after such transmission, unless Congress shall by law provide for an earlier effective date of such Executive order or orders."

[34] The session ended on June 16, 1933.

because that Act made appropriations for the Shipping Board (appellant's brief, p. 43). The Act does not mention Executive Order 6166 and on its face gives no indication whatever of any intention on the part of Congress to disapprove the order. If Congress intended to disapprove of the Executive Order it is highly improbable that it would have adopted any such equivocal and ambiguous method of expressing that intent. An examination of the background and legislative history of the Act of June 16, 1933, reveals that there is no basis for appellant's suggestion as to the Act's effect. At no time was Executive Order 6166 mentioned in any of the debates or reports on the Act. The appropriation of funds to the Shipping Board on June 16, 1933, six days after the promulgation of Executive Order 6166, is in no way inconsistent with approval of the order. Under Section 407 of Title IV, Executive Order 6166 could not become effective until sixty days after June 10, 1933, unless Congress should set an earlier effective date. During the intervening period the Shipping Board continued to function, and it was not only proper but necessary that appropriations made during that time should be made to the Board, rather than to the Department of Commerce.

Congress also recognized and approved the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce in a

series of appropriation acts. In the Act of April 7, 1934, Congress, in making appropriations for the Department of Commerce, specifically appropriated funds to the Shipping Board Bureau of that Department to carry out the provisions of the Shipping Act, 1916, and the Merchant Marine Acts of 1920 and 1928. In so doing, Congress expressly mentioned Executive Order 6166 as the authority under which such functions were to be performed by that Bureau.[35] The same explicit recognition of the validity of Executive Order 6166 occurred in appropriations made to the Department of Commerce in 1935 and in 1936.[36] It is to

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[35] The Appropriation Act provided in part (c. 104, Title III, 48 Stat. 529, 566):

"UNITED STATES SHIPPING BOARD BUREAU

"Salaries and expenses: To carry out the provisions of the Shipping Act, 1916, as amended, and the Merchant Marine Acts of 1920 and 1928, as amended (U. S. C., title 46, secs. 804, 805, 861–889; Supp. VI, title 46, secs. 891–891x, Act of June 16, 1933, 48 Stat., 298; Executive Order Numbered 6166, June 10, 1933)," * * *.

[36] The Act of March 22, 1935 (c. 39, Title III, 49 Stat. 67, 99) provided:

"UNITED STATES SHIPPING BOARD BUREAU

"Salaries and expenses: To carry out the provisions of the Shipping Act, 1916, as amended, and the Merchant Marine Acts of 1920 and 1928, as amended (U. S. C., title 46, secs. 804, 805, 861–889; Supp. VII, title 46, secs. 891–891x),

be observed that in the Appropriation Act for 1936 Congress added to the duties of the Department of Commerce the administration of the Intercoastal Shipping Act of 1933.

Appellant attempts to discount these appropriation acts on the ground that they merely "casually" mentioned the Executive Order as "a mere matter of recital or citation" (appellant's brief, p. 43). But these statutes cannot be so lightly brushed aside. Whether the Executive Order was referred to casually or otherwise, its mention shows that Congress was aware of the transfer of the functions of the Shipping Board to the Department of Commerce. With that knowledge Congress, not once but several times, appropriated funds to be used by the Department of Commerce in administering the functions formerly performed by the Shipping Board. To suggest, as appellant does, that these repeated appropriations by Con-

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the Act of April 7, 1934 (48 Stat. 566–568), and Executive Order Numbered 6166 (June 10, 1933)," * * *.

The Act of May 15, 1936, c. 405 (49 Stat. 1309, 1345), provided:

"UNITED STATES SHIPPING BOARD BUREAU

"Salaries and expenses: To carry out the provisions of the Shipping Act, 1916, as amended, the Merchant Marine Acts of 1920 and 1928, as amended, the Intercoastal Shipping Act, 1933 (U. S. C., title 46, secs. 741–790, 801–848, 861–889, 891–891x, 911–984); and Executive Order Numbered 6166 (June 10, 1933)," * * *.

gress were mere oversights is to ignore the realities of the situation.[37]

That administrative action taken as a result of misinterpretation of authority may be subsequently ratified by Congress is well established by decisions of this Court. See *Hamilton* v. *Dillin*, 21 Wall. 73, 96–97; *United States* v. *Heinszen & Co.*, 206 U. S. 370, 384; *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690; *Wilson* v. *Shaw*, 204 U. S. 24; *Tiaco* v. *Forbes*, 228 U. S. 549, 556; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, 232; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 427–430; *Mascot Oil Co.* v. *United States*, 282 U. S. 434; *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, 10, 11; *Seattle* v. *Kelleher*, 195 U. S. 351, 359–360; *Hodges* v. *Snyder*, 261 U. S. 600, 602–603; *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 332. In *Tiaco* v. *Forbes*, 228 U. S. 549, 556, the Court said:

> * * * it generally is recognized that in cases like the present, where the act orig-

[37] Appellant's dismissal of these appropriation acts as casual oversights is inconsistent with its contention that the Appropriation Act of June 16, 1933, was a disaffirmance of Section 12 of Executive Order 6166. Apparently appellant believes that although an express reference to Executive Order 6166 and the appropriation of money to be used by the Department of Commerce are too casual to amount to a ratification or recognition of the action of the President in transferring the functions of the Shipping Board to the Department of Commerce, the bare reference to the Shipping Board in the Appropriation Act of June 16, 1933, even though no reference was made to Executive Order 6166, is not too casual to be an express disaffirmance of the executive order.

> inally purports to be done in the name and by the authority of the state, a defect in that authority may be cured by the subsequent adoption of the act.

The principle applied by this Court in *Wilson* v. *Shaw*, 204 U. S. 24, is applicable in the instant case. There suit was instituted by a citizen of the United States to restrain the Secretary of the Treasury from borrowing and paying out money for the construction of the Panama Canal. The petitioner asserted that the United States had acquired no title to the Canal Zone because the statute which authorized the acquisition of the land in question specified that the property was to be secured from the Republic of Colombia, whereas in fact the property upon which the proposed canal was to be built had been acquired from the Republic of Panama by treaty. In affirming the dismissal of the bill this Court held that Congress by subsequent legislation had ratified the action of the President. The Court stated, with reference to the position of the petitioner (p. 32):

> He contends that whatever title the Government has was not acquired as provided in the act of June 28, 1902, by treaty with the Republic of Colombia. A short but sufficient answer is that subsequent ratification is equivalent to original authority. The title to what may be called the Isthmian or Canal Zone, which at the date of the act was in the Republic of Colombia, passed by an act of secession to the newly formed Republic of

> Panama. The latter was recognized as a nation by the President. A treaty with it, ceding the Canal Zone, was duly ratified. 33 Stat. 2234. Congress has passed several acts based upon the title of the United States, among them one to provide a temporary government, 33 Stat. 429; another fixing the status of merchandise coming into the United States from the Canal Zone, 33 Stat. 843; another, prescribing the type of canal, 34 Stat. 611. These show a full ratification by Congress of what has been done by the Executive. Their concurrent action is conclusive upon the courts. We have no supervising control over the political branch of the Government in its action within the limits of the Constitution. *Jones* v. *United States,* 137 U. S. 202, and cases cited in the opinion; *In re Cooper,* 143 U. S. 472, 499, 503.

That such ratifying legislation is applicable and may be given retroactive effect by an appellate court even though enacted after the decision of the court of first instance passing upon the administrative action involved is well settled. *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226; *United States* v. *Schooner Peggy,* 1 Cranch, 103, 110; *Dinsmore* v. *Southern Express Company &c.,* 183 U. S. 115; *Dorchy* v. *Kansas,* 264 U. S. 286; *Steamship Company* v. *Joliffe,* 2 Wall. 450. It should be noted that the ratification here involved is not a bare attempt of the legislature to retroactively create li-

ability for a transaction fully consummated in the past (*Cf. Graham & Foster* v. *Goodcell,* 282 U. S. 409, 429), and that the effect of the ratification is not to impair any vested right of appellant.

III

IN ABOLISHING THE SHIPPING BOARD AND TRANSFERRING ITS FUNCTIONS TO THE DEPARTMENT OF COMMERCE, CONGRESS PROPERLY EXERCISED POWERS CONFERRED UPON IT BY THE CONSTITUTION

A. TITLE IV DID NOT IMPROPERLY DELEGATE LEGISLATIVE POWER TO THE PRESIDENT

In issuing the order now under attack, the Secretary of Commerce exercised authority originally conferred upon the Shipping Board by the Shipping Act. The appellant does not contend that this original delegation of power to the Shipping Board was unconstitutional. If the original delegation to the Shipping Board was proper, a similar delegation to the Secretary of Commerce, made directly by Congress, would have been equally proper because the prohibition against improper delegation of legislative power controls the range of discretion which Congress may permit to its instrumentalities and not the identity of those instrumentalities. It follows that no question of improper delegation of power is *directly* raised in the instant case because appellant apparently concedes that the provisions of the Shipping Act under which the Secretary's order was issued do not violate the doctrine of separation of powers. The

question of delegation of power arises only because the transfer of functions of the Shipping Board to the Department of Commerce was made by an executive order issued by the President pursuant to the provisions of Title IV. If that transfer originally had been made directly by Congress by its own action instead of through the instrumentality of the President, the basis upon which appellant bases its arguments as to delegation of legislative power would not exist. Appellant does not, therefore, complain that it is about to be injured by an order made by an executive officer in the exercise of unlimited and uncontrolled discretion improperly conferred upon him by Congress; its complaint is directed to the question of the constitutionality of the legislation under which the President acted in transferring the functions of the Shipping Board to the Department of Commerce.

The appellant contends that Title IV improperly delegates legislative power to the President, first, because it failed "to define adequately the subject" to which it was addressed, and second, because it "failed to limit the range of the President's discretion over" that subject (appellant's brief, pp. 48–52). Consideration of the subject matter to which Title IV relates and analysis of its provisions show that this contention is without foundation.

Section 401 of Title IV declares that a serious emergency exists by reason of the general economic depression and that it is imperative to reduce dras-

tically governmental expenditures. The section provides that the President "shall investigate the present organization of all executive and administrative agencies of the Government and shall determine what changes therein are necessary to accomplish" the specific purposes which are listed in six subparagraphs.[38]

Section 402, which has been discussed on pages 40–51, *supra,* defines the executive agencies which the President is authorized to reorganize and consolidate. Section 403 provides that whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies or the functions thereof is necessary to accomplish any of the purposes set forth in Section 401, he may by executive order direct such regrouping,

[38] These purposes are:

(a) To reduce expenditures to the fullest extent consistent with the efficient operation of the Government;

(b) To increase the efficiency of the operations of the Government to the fullest extent practicable within the revenues;

(c) To group, coordinate, and consolidate executive and administrative agencies of the Government, as nearly as may be, according to major purposes;

(d) To reduce the number of such agencies by consolidating those having similar functions under a single head, and by abolishing such agencies and/or such functions thereof as may not be necessary for the efficient conduct of the Government.

(e) To eliminate overlapping and duplication of effort; and

(f) To segregate regulatory agencies and functions from those of an administrative and executive character.

consolidation, transfer, or abolition. Subparagraph (d) of Section 403 limits the President's power by providing that he shall not have the authority to abolish or transfer an executive department or all the functions thereof. Section 407 requires an executive order issued under Section 403 to be submitted to Congress while in session and provides that the order shall not become effective until the expiration of sixty days after it has been so submitted.

Title IV is intended to authorize the reorganization of all of the executive and administrative agencies of the government. Although that authorization is extended to *all* of those agencies, without exception, the subject matter of the Act is nevertheless limited in character. The power which it confers cannot within the bounds of reason be compared to the unfettered and uncontrolled power to approve codes of fair competition for *all trades and industries in the country* condemned by this Court in *Schechter Corp.* v. *United States,* 295 U. S. 495.[39].

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[39] In that case this Court said "the power conferred" related "to a host of different rates and industries, thus extending the President's discretion to all varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country." 295 U. S. at p. 539.

The contrast is obvious between a statute authorizing the President to prescribe what rules he shall deem advisable for all *trade and industry* and one directing him to investigate and, if necessary, to reorganize and consolidate all executive and administrative agencies of the federal government.

The President's power to deal with the subject matter of Title IV is not unlimited and absolute. By Section 401 *he is required* to investigate all executive and administrative agencies of the government and to determine what changes therein are necessary to accomplish the purposes specified in the six subparagraphs of the section. To the extent that this section makes action by the President mandatory, it cannot be said to permit him to act or not to act as he sees fit, and in this respect it differs materially from the statute held to be unconstitutional by this Court in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388.

The purposes specified in the subparagraphs of Section 401 provide standards to guide the President in exercising the authority conferred on him by Section 403. The standards provided are more detailed and definite than many which have been sustained by this Court: for example, the standard of "public convenience, interest or necessity" set up to guide the Radio Commission in issuing licenses (*Radio Commission* v. *Nelson Bros. Co.,* 289 U. S. 266, 279, 285); the standard of "purity, quality and fitness for consumption" which the Secretary of the Treasury was directed to apply in connection with the importation of tea (*Buttfield* v. *Stranahan,* 192 U. S. 470, 494); the standard of "public interest" established to guide the Interstate Commerce Commission in the exercise of its power to approve the acquisition of one carrier by another (*New York Central Securities Corp.* v. *United*

States, 287 U. S. 12, 24–25); *cf. Avent* v. *United States,* 266 U. S. 127, 130; *United States* v. *Shreveport Grain and Elevator Co.,* 287 U. S. 77, 85; *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, 192.

Section 403 required the President, before ordering the consolidation or reorganization in any executive agency, to "find" and "declare" that the consolidation or reorganization was necessary to the accomplishment of the purposes set forth in Section 401. The President made such a finding when he promulgated Executive Order 6166, and the order therefore is not subject to the objection successfully made in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 431, that it "contains no finding, no statement of the grounds of the President's action."[40] Without specifying the grounds on which

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[40] The finding and declaration were contained in the Executive Order and read as follows:

"Whereas section 16 of the act of March 3, 1933 (Public, No. 428, 47 Stat. 1517), provides for reorganizations within the executive branch of the Government; requires the President to investigate and determine what reorganizations are necessary to effectuate the purposes of the statute; and authorizes the President to make such reorganizations by Executive order; and

"Whereas I have investigated the organization of all executive and administrative agencies of the Government and have determined that certain regroupings, consolidations, transfers, and abolitions of executive agencies and functions thereof are necessary to accomplish the purposes of section 16;

"Now, therefore, by virtue of the aforesaid authority, I do hereby order that:" * * *.

its objection rests, the appellant asserts categorically that the President's finding was "completely inadequate" (appellant's brief, p. 52). No basis exists for this assertion. The Executive Order clearly stated that the consolidations, transfers, and abolitions, which it directed were "necessary to accomplish the purposes" of Section 401, and this finding and declaration satisfy the requirements of Section 403.[41]

That Title IV does not improperly delegate legislative power to the President becomes even clearer when the purposes of the statute and the nature of its subject matter are considered. Its purpose was to reorganize, in the interests of economy and efficiency, the administrative and executive agencies of the federal government. It is well known that those agencies are numerous and that they discharge a great variety of duties and functions. The formulation and execution of a plan of con-

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The Executive Order refers to Section 16 of the Act of March 3, 1933, 47 Stat. 1517, because it was that section of the Act of March 3, 1933, which contained the amendment to Title IV. The reference to the purposes of Section 16 clearly includes the purposes specified in Section 401.

[41] If the finding had repeated the statement of purposes found in Section 401, it clearly would have been adequate. See *United States* v. *Curtiss-Wright Export Corp. et al.*, No. 98, October Term, 1936, where the executive order sustained contained a finding stated in the precise words of the statute under which the order was made. The fact that the finding in the instant case refers generally to Title IV instead of repeating the specifications of purpose is not a fatal defect. The adequacy of an executive finding is not to be determined on such a purely formal and artificial basis.

solidation and reorganization necessarily requires detailed knowledge of many intricate questions of fact and careful consideration of equally numerous administrative and executive problems. If, as appellant contends, the Constitution requires Congress to specify by name each of the boards and bureaus and agencies which is to be reorganized, and otherwise to legislate with respect to each detail of the plan of reorganization, it is doubtful whether, as a practical matter, it would ever be possible to consummate a plan of reorganization.[42]

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[42] This point was made in the Congressional discussions of Title IV. Representative Mapes stated (Cong. Rec., Vol. 75, Pt. 8, p. 9264):

"I agree fully with the position of the gentleman from Illinois [Mr. Holaday] that, if we ever have a reorganization of the various departments of the Government really worth while, we must give the President the necessary authority to do the job. The debate on this bill and the action of the House during the last few days are evidence anew of the correctness of that statement."

Representative Ludlow stated (Cong. Rec., Vol. 76, Pt. 5, p. 4603):

"One thing that is absolutely certain is that the Federal Government will never be reorganized adequately and thoroughly except by the delegation of ample authority to the President, as provided in the language of this bill. The history of all similar attempts proves this to be true. Three Presidents of the United States in modern times have ventured into the field of governmental reorganization, each time with disastrous results because in no instance did Congress give to the Executive the authority he must have to perform the task. It was a dream of President Taft, whose well-meant efforts registered absolutely nil. The most far-reaching attempt in that direction was made by President Harding, who chose Walter F. Brown, now the Postmaster

Moreover, the task of working out the details of the plan of a reorganization is one for which the Executive is peculiarly competent. Because of the nature of his duties he is better acquainted than Congress with the details of the operations of many of the administrative and executive agencies of the federal government, and he may obtain additional information with respect to such details by methods which are more direct and less cumbersome than those normally available to Congress.[43]

These considerations lead to the conclusion that in enacting Title IV "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute." *Buttfield* v. *Stranahan*, 192 U. S. 470, 496. *Cf. Hampton*

General, to draft the plan. The problem was studied with extreme pains and care and a report was submitted to Congress, but a thousand special interests and individuals swooped down upon Congress to protest the demobilization of the bureaus, and in the end nothing was done."

[43] *Cf. United States* v. *Curtiss-Wright Export Corp., et al.*, No. 98, October Term, 1936, where this Court upheld the delegation of authority made to the President by the Joint Resolution of Congress of May 28, 1934 (c. 365, 48 Stat. 811). That resolution authorized the President to prohibit the sale of arms to certain countries in South America if he should find that the prohibition would contribute to the reestablishment of peace between those countries. Speaking of the President, this Court said: "Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign governments, and especially is this true in time of war."

& Co. v. *United States*, 276 U. S. 394; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 85. To assert that Title IV improperly delegates legislative power to the President is to embrace the conclusion that the Constitution denies to Congress "the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards while leaving to selected instrumentalities the making of subordinate rules within the prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply", and this is a conclusion which this Court expressly disapproved in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421.

In considering the question of delegation of legislative power, one other fundamental consideration must be taken into account. Title IV is not a statute which lays down rules of conduct to be generally enforced by the coercive power of the federal government. In this respect the authority conferred by Title IV differs from the coercive legislative power which this Court held had been improperly delegated to the Executive in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, and *Schechter Corp.* v. *United States*, 295 U. S. 495." To para-

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" In *Schechter Corp.* v. *United States*, 295 U. S. 495, this Court described Title I of the National Industrial Recovery Act in these words (p. 529):

"It involves the coercive exercise of the law-making power. The codes of fair competition which the statute attempts to

phrase the language of this Court in *United States* v. *Grimaud,* 220 U. S. 506, 516, Title IV does not declare general rules with reference to the rights of persons and property, nor does it create or regulate obligations and liabilities nor declare what shall be crimes nor fix penalties therefor. The exercise of the powers possessed by executive departments and agencies may doubtless affect the rights and obligations of citizens generally, but the internal organization and administration of those agencies do not, and Title IV relates solely to matters of internal organization and administration. The contrast between the two kinds of statute is illustrated by the two statutes involved in the present case. It cannot be said that any authority conferred by Title IV has been exercised so as to affect the terms and substance of the Secretary's order which appellant attacks. So far as that order operates to affect the rights of appellant, its operation must be justified under the applicable provisions of the Shipping Act. Those provisions au-

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authorize are codes of laws. If valid, they place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent. Violations of the provisions of the codes are punishable as crimes."

In its earlier decision in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, the Court held section 9 (c) of Title I of the National Industrial Recovery Act invalid because it gave "to the President an unlimited authority to determine the policy and to lay down the *prohibition* or not to lay it down, as he may see fit" (p. 415). [Italics supplied.]

thorize the making of administrative rules and orders which may be enforced by the coercive powers of the government, and in this respect the Shipping Act stands in marked contrast to Title IV which merely authorizes changes in the internal organization of administrative agencies. In the present case the only thing affected by Title IV has been the identity of the administrative agency which made the order under attack. If the order had been made by the Shipping Board instead of by the Secretary of Commerce, presumably the appellant could and would have advanced all of the objections which it now makes with respect to the unfairness of the order and the motives which prompted it. The change in the identity of the executive agency which made the order has not injured appellant in any way or affected its rights and obligations.

In the case of a statute such as Title IV, which relates solely to the internal organization of the government, the prohibition against the delegation of legislative power, if it is to be applied at all, is to be applied far less rigorously than in the case of a statute which lays down general rules to be enforced by the coercive power of the government. This is demonstrated by the wide latitude which has been permitted to Congress in delegating authority which does not involve the exercise of its coercive powers. Thus, it is well settled that Congress has a wider power of delegation in legislation

disposing of and regulating public property than in ordinary regulatory legislation. *Butte City Water Co.* v. *Baker,* 196 U. S. 119, 126; *United States* v. *Midwest Oil Co.,* 236 U. S. 459, 474; *United States* v. *Wilbur,* 283 U. S. 414, 419; *United States* v. *Grimaud,* 220 U. S. 506, 516.[45] Similarly, Congress may vest a large measure of discretion in administrative officers in connection with the establishment of fiscal agencies. For example, the acts establishing United States banks left to the directors practically unrestricted power to determine where branches of the banks should be established. See *McCulloch* v. *Maryland,* 4 Wheat. 316, pp. 335–337, 424.[46] See also *First National Bank* v. *Union Trust Co.,* 244 U. S. 416, 427. Likewise, in disposing of property of the United States, Con-

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[45] In *Butte City Water Co.* v. *Baker,* 196 U. S. 119, 126, this Court said:

"The Nation is an owner, and has made Congress the principal agent to dispose of its property. * * * While the disposition of these lands is provided for by Congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal. *It is not of a legislative character in the highest sense of the term,* and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands." [Italics supplied.]

[46] In *McCulloch* v. *Maryland,* 4 Wheat. 316, it was contended by counsel for the State of Maryland that the grant of this unrestricted power was improper (4 Wheat. 335–337), but this contention was summarily disposed of by Chief Justice Marshall (4 Wheat. 424).

gress may entrust administrative officers with wide discretion. *Cf. United States* v. *Chemical Foundation,* 272 U. S. 1, 11–12; and see *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288.[47] Another striking example of discretion left to the Executive in carrying out laws which are not of regulatory or coercive nature is found in the statute authorizing the issuance of obligations of the United States. Although the power to borrow money on the credit of the United States is a legislative power, Congress in authorizing the Secretary of the Treasury to borrow money has conferred upon him extremely broad powers. This legislation is collected in Title 31 of U. S. C., Section 752–757. An examination of the legislation shows that the Secretary of the Treasury is left wholly free to determine whether and when to issue any or all of different types of obligations authorized by the statute. In some cases the rate of interest is left entirely to his discretion. In the case of some securities he is given his choice of different schemes of complete or partial tax exemption.

The distinction between exercises of legislative power which are regulatory or coercive in character and those which are not is not fortuitous but

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[47] In *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, the petitioners maintained that the statute involved improperly delegated legislative power to the Tennessee Valley Authority. In sustaining the constitutionality of the particular disposition of property involved in that case, this Court passed over this contention without discussion.

rests upon the fundamental principle which underlies the doctrine of the separation of the governmental powers. The principle is that the liberty and safety of a citizen requires that the same agency of government which enacts laws shall not be entrusted with their enforcement, and that the enforcement agency shall not have the power of enacting laws. Montesquieu, whose influence upon the framers of the Constitution is well known, said that the principle was necessary to liberty, lest "the same monarch or senate should enact tyrannical laws, to enforce them in a tyrannical manner" *Esprit des Lois* (Book 2, Chapter 6). See also Blackstone's *Commentaries,* p. 46; *Federalist,* No. 47; Story, *Constitution of United States,* 4th Edition, Sections 517, 524. When Congress does not authorize the making of general rules to be enforced by the coercive power of the government but merely legislates for the purpose of readjusting the internal organization of government agencies, its action by no stretch of the imagination can be regarded as presenting any danger of tyranny because no coercion or regulation of individuals or of private rights by arbitrary and uncontrolled authority is in any way involved.

In still another respect Title IV differs strikingly from the statutes involved in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *Schechter Corp.* v. *United States,* 295 U. S. 495. Those statutes conferred wide authority which could be exercised without reference to any subsequent congressional

action. Under Section 407 of Title IV, however, an exercise of the authority conferred by the statute can only become effective after there has been an opportunity for congressional rejection. In considering the legality of an executive order which has been issued pursuant to Title IV and submitted to Congress and not disaffirmed or rejected, it should be remembered that the order is supported not only by the original authorization but also by the subsequent approval of the legislature.[48]

B. THE SCOPE OF THE POWERS ORIGINALLY CONFERRED BY TITLE IV IS NOW IMMATERIAL BECAUSE CONGRESS HAS RECOGNIZED AND RATIFIED THE ACTION OF THE PRESIDENT IN ABOLISHING THE SHIPPING BOARD AND TRANSFERRING ITS FUNCTIONS TO THE DEPARTMENT OF COMMERCE

In the instant case it is no longer necessary to determine whether or not Congress improperly delegated power to the President by the provisions of Title IV, because by subsequent legislation Congress has recognized and ratified the

[48] *Cf.* the English practice of provisional orders, *i. e.*, administrative orders which require parliamentary approval before they become effective or which become effective only if they are submitted to Parliament and not disapproved within the specified time. See, for example, Halsbury's *Statutes of England*, Vol. XII (1930), pp. 749–750, with respect to the issuance of provisional orders by local government boards. See also *Chelmsford Union* v. *The Local Board of Health* (1852), 2 E. & B. 500 n; 118 E. R. 855, and *Bessemer and Co., Ltd.*, v. *Gould* (1912), 107 L. T. R. 298; 23 Cox C. C. 145. See also *The Powers of Public Departments to Make Rules Having the Force of Law*, M. L. Gwyer, 5 Journal of Public Administration 404, 410–413 (1927).

action of the President in abolishing the Shipping Board and transferring its functions to the Department of Commerce. This subsequent legislation has been explained earlier in this brief (pp. 52–58, *supra*), and it has been shown that it can be regarded only as a recognition and ratification of the President's action. If that action was at any time invalid because undertaken pursuant to an improper delegation of authority, the ratification cured that defect. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.*, *supra*. See also *Mascot Oil Co.* v. *United States*, 282 U. S. 434; *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, 10, 11; *Seattle* v. *Kelleher*, 195 U. S. 351, 359–360; *Hamilton* v. *Dillin*, 21 Wall. 73; *Hodges* v. *Snyder*, 261 U. S. 600, 602–603; *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 332; *Wagner* v. *Baltimore*, 239 U. S. 207, 216, 217; *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Kansas City Ry.* v. *Road District*, 266 U. S. 379; *Tiaco* v. *Forbes*, 228 U. S. 549.

Appellees do not contend that Congress has ratified or attempted to ratify its own action in delegating power to the President. What it has ratified is the action of the President in abolishing the Shipping Board and transferring its functions to the Department of Commerce. As a result of that ratification the abolition of the Shipping Board and the transfer of its functions to the Department

of Commerce must now be regarded as if it had been expressly directed by an act of Congress. When the case is viewed in this light, the question of the scope of the power delegated to the President by Title IV ceases to be material.

C. IN AUTHORIZING THE ABOLITION OF THE SHIPPING BOARD AND THE TRANSFER OF ITS FUNCTIONS TO THE DEPARTMENT OF COMMERCE CONGRESS DID NOT VIOLATE THE PRINCIPLE OF SEPARATION OF POWERS

The appellant contends that because the functions of the Shipping Board were of a quasi-judicial and a quasi-legislative character Congress could not transfer those functions to an executive department or officer without violating the doctrine of separation of powers (appellant's brief, p. 48). Appellant's position appears to be that, although the powers in question can properly be delegated, the Constitution permits Congress to delegate them only to a particular kind of officer or agency. This is a constitutional doctrine, novel in conception and startling in its consequences. Hitherto the doctrine of separation of powers has been applied to limit the scope of the authority and discretion which Congress may confer when it delegates power to an administrative body or agency. Appellant now seeks to extend the doctrine so as to limit and control the power of Congress to determine the identity or the personnel of the agency or instrumentality to which, within the prescribed limits, it may delegate power. The attempted extension is unwarranted; if a power can be delegated

at all it can be delegated to any kind of officer or agency which Congress may select.[49]

If, as appellant suggests, Congress cannot delegate quasi-legislative or quasi-judicial power to an executive department or officer, it must, if it wishes to delegate such power at all, create a special commission or bureau for that purpose. Acceptance of this principle would lead inevitably to the creation of a kind of fourth grand division of the federal government consisting solely of these independent commissions or bureaus. This is a radical departure from traditional concepts of the nature of the federal government which finds no support in the language of the Constitution or in the decisions of this Court.

The one decision which appellant cites in support of its contention is *Humphrey's Executor* v. *United*

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[49] The discussion in No. 47 of the Federalist shows that the doctrine as to separation of powers was intended to limit the *nature* and *extent* of the power which might be delegated by one branch of the government to another:

"From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying 'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates', or, 'if the power of judging be not separated from the legislative and executive powers', he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." [Italics supplied.]

States, 295 U. S. 602 (appellant's brief, p. 48). That decision did not purport to limit the power of Congress either with respect to the delegation of quasi-legislative and quasi-judicial powers, or otherwise. On the contrary, the effect of that decision was to establish the power of Congress to limit, to some extent, the power of the Executive to remove the members of certain kinds of administrative agencies. Assuming for the moment that the Shipping Board was precisely similar in all respects to the Federal Trade Commission, and that, therefore, the decision in *Humphrey's Executor* v. *United States,* 295 U. S. 602, applied to the Shipping Board, that decision does not support appellant's argument. The principle that Congress has the power to prescribe the terms of the members of the Shipping Board and to specify the grounds upon which they may be removed and that the President can not remove a member except on one of the specified grounds is no premise for the argument that under the Constitution Congress does not have the power to abolish the Shipping Board and transfer its functions to the Department of Commerce.

In numerous instances this Court has approved the exercise of duties calling for the exercise of quasi-legislative and quasi-judicial powers by executive officers of the government. In *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, suit was instituted to set aside a determination of the Secretary of the Interior with respect to a claim to land, rendered

pursuant to a statute which gave him jurisdiction to determine the matter. In denying the relief sought, this Court stated (p. 324):

> Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.

See also *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, 108.

In *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, a statute which conferred upon the Secretary of Commerce and Labor and collectors of customs the duties of imposing and collecting certain prescribed penalties from steamship companies for illegally transporting immigrants to the United States was attacked on the ground that the Act conferred judicial powers upon the Secretary.

In disposing of that objection the Court said (p. 338):

> In all cases of penalty or punishment, it is contended, enforcement must depend upon the exertion of judicial power, either by civil or criminal process, since the distinction between judicial and administrative functions cannot be preserved consistently with the recognition of an administrative power to enforce a penalty without resort to judicial authority. But the proposition magnifies the judicial to the detriment of all

> other departments of the Government, disregards many previous adjudications of this court and ignores practices often manifested and hitherto deemed to be free from any possible constitutional question.

After citing previous decisions, the Court stated (p. 339):

> In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.

The exercise by executive officers of regulatory powers, similar in nature to those of the Shipping Board, was also approved in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.[50]

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[50] In that case the Court sustained the validity of the Grain Futures Act, which authorized the Secretary of Agriculture to designate "contract markets" upon which trading in grain futures might be conducted. A commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General—all executive officers—was given power to revoke the designation of such contract markets and to suspend the trading privileges of individuals for failure to comply with the requirements of the Act.

Under the Packers and Stockyards Act, whose constitutionality was sustained in *Stafford* v. *Wallace,* 258 U. S. 495, the Secretary of Agriculture exercises quasi-legislative and quasi-judicial powers. That Act provides for the regulation of the business of meat packers and for the supervision and control of stockyards. It constitutes the Secretary of Agriculture a tribunal to hear complaints, to make findings thereon, and to issue orders to compel compliance with the regulatory features of the Act. The Secretary is authorized to determine what stockyards are to be subject to the provisions of the Act. He is given authority to prescribe, upon certain conditions, the rates to be charged by stockyards subject to the Act, and also the rates to be charged by market agencies engaged in business at those stockyards. In *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, this Court approved the exercise by the Secretary of his power to prescribe the rates to be charged by market agencies. See also *Acker* v. *United States,* 298 U. S. 426; *Morgan* v. *United States,* 298 U. S. 468.[51] The exercise of the rate making power of the Secretary with reference to the stockyards companies

[51] In *Morgan* v. *United States,* 298 U. S. 468, this Court said in describing the action of the Secretary in fixing the rates which may be charged by market agencies (p. 480):

"A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi-judicial* character." [Italics supplied.]

was approved in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38. In that case the Court stated (p. 50):

> Exercising its rate-making authority, the legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards.

The power to modify or change tariff duties is clearly quasi-legislative in character, yet this Court has held that it may within proper limits be delegated to the President. *Hampton & Co.* v. *United States*, 276 U. S. 394. See also *Butfield* v. *Stranahan*, 192 U. S. 470; *United States* v. *Grimaud*, 220 U. S. 506; *Union Bridge Co.* v. *United States*, 204 U. S. 364. It would be possible to cite many other examples of the exercise of quasi-judicial and quasi-legislative powers by purely executive officers. Indeed it has hitherto never been suggested, either with respect to the federal government or the government of the several states, that the doctrine of separation of powers requires that all regulatory powers of a quasi-judicial or a quasi-legislative character be exercised by independent boards or commissions.[52]

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[52] It is interesting to note that in 1812 James Monroe expressed an opinion clearly inconsistent with the notion that quasi-judicial or quasi-legislative powers could be exercised only by an independent board or commission. In opposing the removal of the patent office from the Department of State, he said (2 American State Papers, Misc., p. 192):

The regulatory functions which were performed by the Secretary of Commerce by virtue of his succession to the duties of the Shipping Board differ in no essential respect from those which were exercised by purely executive officers in the cases discussed above. Those decisions provide a conclusive answer to the contention that Congress, in authorizing the transfer made by Section 12 of Executive Order 6166, violated the principle of separation of powers.

"I have always thought that every institution, of what nature soever it might be, ought to be comprised within some one of the Departments of Government, the chief of which only should be responsible to the Chief Executive Magistrate of the nation. The establishment of inferior independent Departments, the heads of which are not, and ought not to be, members of the administration, appears to me to be liable to many serious objections, which will doubtless occur to you."

It is also significant that from an early period the States conferred regulatory powers of a quasi-judicial or quasi-legislative character upon executive officers. For example, New York in 1851 created a Superintendent of Banks who exercised regulatory powers over the banking business. See New York Laws, 1851, c. 164, §§ 1 and 2. In 1859 New York created a Superintendent of Insurance who exercised similar powers with respect to the business of insurance. Laws of New York, 1859, c. 366, §§ 1 and 2. The practice of delegating regulatory powers to commissions rather than to executive officers is of more recent origin. The first state railroad commissions with plenary regulatory powers were created between 1871 and 1875. See Sharfman, *The Interstate Commerce Commission*, Vol. 1, pp. 14–15.

If appellant's contention is pressed to its logical conclusion, the results are startling and far-reaching. Most of the executive departments and officers of the federal government exercise, in one connection or another, powers which may be described as quasi-legislative or quasi-judicial in character. If appellant's contention is correct, the exercise of these powers has been and is unconstitutional. If these powers can be constitutionally exercised only by independent commissions, it will be necessary to create additional and numerous commissions to discharge duties hitherto performed by executive officers and departments. If the already intricate and complex structure of the federal government is to be further complicated by the creation of numerous additional bureaus and commissions and regulatory bodies, it may well be doubted whether reorganization of that structure in the interests of economy and efficiency will ever be possible. The tendency of the complexity of modern life and of the expansion in the duties assumed by the federal government, to encourage or compel an increase in the size of the governmental structure and in the number of its component parts is already a matter of public concern. This tendency should not be accelerated by the acceptance of an arbitrary and artificial gloss upon the Constitution.

CONCLUSION

For the foregoing reasons the decree of the District Court of the United States for the Southern District of New York should be affirmed.

Respectfully submitted.

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APPENDIX

Title IV of the Act of June 30, 1932, c. 314, 47 Stat. 414, as amended by the Act of March 3, 1933, c. 212, 47 Stat. 1517, and the Act of March 20, 1933, c. 3, 48 Stat. 16 (U. S. C., Title 5, secs. 124–132) provides:

TITLE IV. REORGANIZATION OF EXECUTIVE DEPARTMENTS

DECLARATION OF STANDARD

SEC. 401. The Congress hereby declares that a serious emergency exists by reason of the general economic depression; that it is imperative to reduce drastically governmental expenditures; and that such reduction may be accomplished in great measure by proceeding immediately under the provisions of this title.

Accordingly, the President shall investigate the present organization of all executive and administrative agencies of the Government and shall determine what changes therein are necessary to accomplish the following purposes:

(a) To reduce expenditures to the fullest extent consistent with the efficient operation of the Government;

(b) To increase the efficiency of the operations of the Government to the fullest extent practicable within the revenues;

(c) To group, coordinate, and consolidate executive and administrative agencies of the Government, as nearly as may be, according to major purposes;

(d) To reduce the number of such agencies by consolidating those having similar functions under a single head, and by abolishing such agencies and/or such functions thereof as may not be necessary for the efficient conduct of the Government;

(e) To eliminate overlapping and duplication of effort; and

(f) To segregate regulatory agencies and functions from those of an administrative and executive character.

DEFINITION OF EXECUTIVE AGENCY

SEC. 402. When used in this title, the term "executive agency" means any commission, independent establishment, board, bureau, division, service, or office in the executive branch of the Government and, except as provided in section 403, includes the executive departments.

POWER OF PRESIDENT

SEC. 403. Whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies and/or the functions thereof is necessary to accomplish any of the purposes set forth in section 401 of this title, he may by Executive order—

(a) Transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency;

(b) Consolidate the functions vested in any executive agency; or

(c) Abolish the whole or any part of any executive agency and/or the functions thereof; and

(d) Designate and fix the name and functions of any consolidated activity or executive agency and the title, powers, and duties of its executive head; except that the President shall not have authority under this title to abolish or transfer an executive department and/or all the functions thereof.

SEC. 404. The President's order directing any transfer, consolidation, or elimination under the provisions of this title shall also make provision for the transfer or other disposition of the records, property (including office equipment), and personnel, affected by such transfer, consolidation, or elimination. In any case of a transfer or consolidation under the provisions of this title, the President's order shall also make provision for the transfer of such unexpended balances of appropriations available for use in connection with the function or agency transferred or consolidated, as he deems necessary by reason of the transfer or consolidation, for use in connection with the transferred or consolidated function or for the use of the agency to which the transfer is made or of the agency resulting from such consolidation.

SAVING PROVISIONS

SEC. 405. (a) All orders, rules, regulations, permits, or other privileges made, issued, or granted by or in respect of any executive agency or function transferred or consolidated with any other executive agency or function under the provisions of this title, and in effect at the time of the transfer or consolidation, shall continue in effect to the same extent as if such transfer or consolidation had not occurred, until modified, superseded, or repealed.

(b) No suit, action, or other proceeding lawfully commenced by or against the head of any executive agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of any transfer of authority, power, and duties from one officer or executive agency of the Government to another under the provisions of this title, but the court, on motion or supplemental petition filed at any time within twelve months after such transfer takes effect, showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, may allow the same to be maintained by or against the head of the executive agency or other officer of the United States to whom the authority, powers, and duties are transferred.

(c) All laws relating to any executive agency or function transferred or consolidated with any other executive agency or function under the provisions of this title, shall, in so far as such laws are not inapplicable, remain in full force and effect, and shall be administered by the head of the executive agency to which the transfer is made or with which the consolidation is effected.

WINDING UP AFFAIRS OF AGENCIES

SEC. 406. In the case of the elimination of any executive agency or function, the President's order providing for such elimination shall make provision for winding up the affairs of the executive agency eliminated or the affairs of the executive agency with respect to the functions eliminated, as the case may be.

EFFECTIVE DATE OF EXECUTIVE ORDER

SEC. 407. Whenever the President makes an Executive order under the provisions of this title, such Executive order shall be submitted to the Congress while in session and shall not become effective until after the expiration of sixty calendar days after such transmission, unless Congress shall by law provide for an earlier effective date of such Executive order or orders.

APPROPRIATIONS IMPOUNDED

SEC. 408. The appropriations or portions of appropriations unexpended by reason of the operation of this title shall not be used for any purpose but shall be impounded and returned to the Treasury.

TERMINATION OF POWER

SEC. 409. No Executive order issued by the President in pursuance of the provisions of section 403 of this title shall become effective unless transmitted to the Congress within two years from the date of the enactment of this Act.

The pertinent provisions of the Shipping Act, 1916 (September 7, 1916, c. 451, 39 Stat. 738, as amended; U. S. C., Title 46, secs. 801, *et seq.*), provide—

Section 801. Terms defined. When used in this chapter:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Terri-

tories, or possessions and a foreign country, whether in the import or export trade: *Provided,* That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

* * * * * * *

(Sept. 7, 1916, c. 451, § 1, 39 Stat. 738; July 15, 1918, c. 152, § 1, 40 Stat. 900.)

* * * * * *

§ 812. Rebates and discriminations by carriers by water prohibited; use of "fighting ship." No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term

"deferred rebate" in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense. (Sept. 7, 1916, c. 451, § 14, 39 Stat. 733; June 5, 1920, c. 250, § 20, 41 Stat. 996.)

§ *813. Determination by board as to violations.* The board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

(1) Has violated any provision of the preceding section, or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in the preceding section, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

If the board determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the board shall thereupon certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the board certifies that the violation has ceased or such combination, agreement, or understanding has been

terminated. (Sept. 7, 1916, c. 451, § 14a; June 5, 1920, c. 250, § 20, 41 Stat. 996.)

§ 814. Contracts between carriers filed with board. Every common carrier by water, or other person subject to this chapter, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1 to 11, inclusive, and section 15 of chapter 1, of Title 15, Commerce and Trade, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action. (Sept. 7, 1916, c. 451, § 15, 39 Stat. 733.)

§ *815. Discriminatory acts prohibited.* It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the

regular rates then established and enforced on the line of such carrier, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter. (Sept. 7, 1916, c. 451, § 16, 39 Stat. 734.)

§ *816. Discriminatory rates prohibited; supervision by board.* No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice. (Sept. 7, 1916, c. 451, § 17, 39 Stat. 734.)

§ 817. *Carriers to establish, observe, and enforce reasonable rates and regulations.* Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause shown may waive such notice.

Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected,

or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice. (Sept. 7, 1916, c. 451, § 18, 39 Stat. 735.)

§ 818. Rates reduced not to be increased without approval of board. Whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water, it shall not increase such rates unless after hearing the board finds that such proposed increase rests upon changed conditions other than the elimination of said competition. (Sept. 7, 1916, c. 451, § 19, 39 Stat. 735.)

* * * * *

§ 820. Reports by carriers required. The board may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account,

record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment. (Sept. 7, 1916, c. 451, § 21, 39 Stat. 736.)

§ *821. Complaints to board and investigations.* Any person may file with the board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter. (Sept. 7, 1916, c. 451, § 22, 39 Stat. 736.)

* * * * *

§ *826. Attendance of witnesses and production of books and papers.* For the purpose of investigating alleged violations of this chapter, the board may by subpoena compel the attendance of witnesses and the

production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing. Subpoenas may be signed by any commissmissioner, and oaths or affirmations may be administered, witnesses examined, and evidence received by any commissioner or examiner, or, under the direction of the board, by any person authorized under the laws of the United States or of any State, Territory, District, or possession thereof to administer oaths. Persons so acting under the direction of the board and witnesses shall, unless employees of the board, be entitled to the same fees and mileage as in the courts of the United States. Obedience to any such subpoena shall, on application by the board be enforced as are orders of the board other than for the payment of money. (Sept. 7, 1916, c. 451, § 27, 39 Stat. 737.)

* * * * *

§ 830. *Venue and procedure in suits to enforce, suspend, or set aside orders.* The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties. (Sept. 7, 1916, c. 451, § 31, 39 Stat. 738.)

§ 831. *Penalty for violation of chapter.* Whoever violates any provision of this chapter, except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by fine of not to exceed $5,000. (Sept. 7, 1916, c. 451, § 32, 39 Stat. 738.)

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 307.—October Term, 1936.

Isbrandtsen-Moller Company, Inc., Appellant, *vs.* The United States of America, et al.	Appeal from the District Court of the United States for the Southern District of New York.

[February 1, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from the final decree of a specially constituted district court of three judges for the Southern District of New York denying an interlocutory injunction and dismissing the appellant's bill for failure to state facts sufficient to constitute a cause of action.[1] The suit was brought to restrain enforcement of an order issued November 18, 1935, by the Secretary of Commerce pursuant to Section 21 of the Shipping Act, 1916,[2] requiring the appellant to file with the Secretary on December 16, 1935, a copy or summary of its books and records for the period September 1 to November 12, 1935, which should show each commodity carried from the United States to a foreign country, with point of shipment, point of destination, and rate charged or collected, the effective date of the rate, and trans-shipment and terminal charges and

[1] 14 F. Supp. 407.

[2] Act of Sept. 7, 1916, c. 451, Sec. 21, 39 Stat. 728, 736, 46 U. S. C. Sec. 820. The suit was instituted under Sec. 31 of the Shipping Act, 39 Stat. 738, 46 U. S. C. Sec. 830, whereby the venue and procedure in suits to restrain enforcement of an order of the Shipping Board is made the same as in similar suits respecting orders of the Interstate Commerce Commission. (Judicial Code, Sec. 208, 28 U. S. C. 46, and the Act of October 22, 1913, c. 32, 38 Stat. 219, 28 U. S. C. Secs. 43, 44, 45, and 47, whereby the venue of a suit brought to set aside an order of the Interstate Commerce Commission is the judicial district in which the petitioner has its principal office.) The complainant named and attempted to serve as defendants, in addition to the United States, the Department of Commerce, the Shipping Board Bureau of the Department of Commerce, Daniel C. Roper, individually and as Secretary of Commerce, James C. Peacock, individually and as Director of the Shipping Board Bureau, and Lamar Hardy, United States Attorney for the Southern District of New York. The suit was dismissed as to many of these defendants for want of service or for want of proper joinder as defendants but the action was maintainable as the United States is, by the statutes, made the proper party defendant in such cases. No point is here made as to the action below dismissing defendants from the cause.

rules affecting rates or value of the service rendered. The order recites that it appears full information as to rates in connection with transportation of certain property from the United States to foreign countries by carriers by water in foreign commerce subject to the Shipping Act 1916 is necessary to the proper administration of the regulatory provisions of the act and that the appellant is engaged in such transportation.

The complaint sets forth five causes of action. The first is that the order is invalid because Congress did not intend by the Legislative Appropriation Act of 1932 [3] to authorize the President to abolish the Shipping Board and transfer its functions to an executive officer such as the Secretary of Commerce and that if Congress did so intend the Act is unconstitutional as attempting to make the head of an executive department also a judicial officer and a legislative officer of the United States and in failing to set up an adequate declaration of policy or standard of action, and, further, that the President promulgated the order of transfer without adequate hearings or findings of fact on which to base it.

The second cause of action is that the Secretary's order is invalid as in substance the attempt of a competitor to regulate or stabilize the appellant's rates and to compel it to charge rates fixed by a shipping monopoly of which appellant's competitor is a member. The charge is that before the order was issued the Secretary had transferred all his Shipping Board functions to one Peacock who was president of a private shipping corporation (The United States Merchant Fleet Corporation) which was actively operating vessels in competition with those of appellant and was a member of a conference or shipping combination whose interests were opposed to those of appellant, which is an independent or non-conference operator; and that the order had been issued for the financial benefit of the competitor. The further allegation is that the constitutional separation of powers between legislative, judicial, and executive branches and the Fifth Amendment of the Constitution forbid the exercise of regulatory or quasi-judicial functions such as were entrusted to the United States Shipping Board by persons or agencies having the interests described and require that the Secretary's order be held for naught.

[3] Act of June 30, 1932, c. 314, 47 Stat. 382, 413.

The third cause of action is that the order was issued not for a public purpose authorized by Congress but in furtherance of a concerted plan to compel the appellant, an independent non-conference carrier, either to join a conference or shipping monopoly, or else suffer damage by disclosure to competitors of current business records showing rates charged and commodities transported. The Secretary's order is alleged to have been issued to promote and foster a monopoly of appellant's competitors.

The fourth cause of action is that the order is an unjust discrimination against appellant which is forbidden by the Fifth Amendment because it requires appellant to file a record of actual transactions whereas the Secretary requires appellant's competitors, the conference lines or members of the shipping combination, merely to file general rate schedules for the future which are not always observed and need not be observed. Further, that the order issued under Section 21 entails penalties for disobedience whereas orders issued by the Secretary to appellant's competitors were not issued under Section 21 or any other section of the act, carried no penalties for non-observance, and called only for information which those competitors were already required by law to file under Section 15 of the Shipping Act of 1916 [4] because of their having joined in a conference or shipping combination.

The fifth cause of action is that the order should be enjoined because the Secretary rejected appellant's offer to file records on condition that they would not be communicated to appellant's competitors to the damage of appellant and because the Secretary stated his purpose was to turn the records over to the public which would result in fostering unfair competition and ruin appellant's business. It is charged that the appellant cannot comply with the order without prejudice or losing its equitable, legal, and constitutional rights.

An injunction affidavit was filed by the appellant and two reply affidavits by the United States. We find it unnecessary to consider them as we are of opinion that the decree dismissing the bill must be affirmed.

The grounds of complaint fall into two general classes. Upon the assumption that the powers and duties of the Shipping Board were effectively transferred to the Secretary of Commerce the

[4] Act of September 7, 1916, § 15, c. 451, 39 Stat. 728, 733, 46 U. S. C. § 814.

claim is that the order was beyond the statutory authority conferred by the Shipping Act, amounted to an illegal search and seizure, and was invalid because arbitrary and unreasonable. But, in addition, it is asserted that transfer of the board's powers and duties to the Secretary was unauthorized by action of Congress and, if so authorized, was in violation of the Constitution.

First. The order is plainly within the terms of Section 21 of the Shipping Act, 1916, which provides:

"The board may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default."

The appellant suggests that the section grants power merely to subpoena records, reports, and information, to be exercised only in hearings upon complaints of violation of the act. This view ignores the fact that Section 27 explicitly authorizes the issuance of subpoenas,[5] including subpoenas *duces tecum*, for hearings upon alleged violations. It is inconceivable that this is mere tautology. The purpose of Section 21 is not far to seek. Other sections forbid allowance of rebates, require the filing of agreements fixing or regulating rates, granting special rates, accommodations or privileges, which may be disapproved, cancelled or modified if the board finds them unjustly discriminatory or violative of the act, prohibit undue or unreasonable preferences or the cutting of established rates and unjust discrimination between shippers or ports.[6] To enable it to perform its functions the board may well need such information as that which the section gives it power to demand. Indeed the order recites that in this instance such information is so required.

Despite its recitals of legitimate purpose, the order, so the complaint alleges, sprang from illegal motives, namely, to regulate

[5] 46 U. S. C. 826.

[6] 46 U. S. C. 812-816.

and stabilize freight rates for the benefit of carriers belonging to steamship conferences, to compel appellant to join a conference, and to create a monopoly in trans-oceanic shipping.

Aside from the principle that if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it,[7] the allegations of the complaint are mere conclusions unsupported by any facts pleaded and are, therefore, insufficient.[8]

The argument that the order amounts to an unreasonable search and seizure, forbidden by the Fourth Amendment, is answered by the fact that it does not call for the production or inspection of any of appellant's books or papers.[9]

The complaint asserts the appellant is the only carrier which has been required, pursuant to Section 21, to file a record of rates actually charged. The section, however, plainly authorizes the making of such an order directed to a single carrier. Nevertheless, the appellant charges such action is unreasonable and arbitrary and violates the Fifth Amendment. The bill itself discloses the conference carriers have filed schedules of their rates and the act requires that if any contract for a change of those rates is made the new rates may be charged only after the board has approved the agreement.[10] The gravamen of the complaint does not appear to be that the appellant is required to supply information not furnished by the conference lines or different information from that which the conference lines file with the Secretary, but that the conference lines are not compelled to adhere to the rates named in their schedules. There is, however, no showing that this circumstance injures the appellant. The data called for related to rates charged in the past,—rates fixed by the appellant without constraint; and the bill makes no charge that compliance with the order will in any wise restrict the appellant's freedom to

[7] *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, 184. *Philadelphia and Trenton R. R. Co.* v. *Stimpson*, 14 Pet. 448, 458, 459; *United States* v. *Chemical Foundation*, 272 U. S. 1, 14, 15.

[8] *Moore* v. *Greene*, 19 How. 69, 72; *St. Louis &c. Ry. Co.* v. *Johnston*, 133 U. S. 566, 577; *Garrett* v. *Louisville & N. R. Co.*, 235 U. S. 308, 313; *Nortz* v. *United States*, 294 U. S. 317, 324-5; *Einstein* v. *Schnebly*, 89 Fed. 540, 548.

[9] *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 45, 46. Compare *Olmstead* v. *United States*, 277 U. S. 438, 463; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612.

[10] 46 U. S. C. 814.

deviate from those past rates in the future. The case made by the bill fails to exhibit discrimination in fact as between appellant and its competitors, much less arbitrary and unjustifiable discrimination.

Second. It is earnestly contended that Title IV of the legislative appropriation act of June 30, 1932, as amended,[11] did not authorize the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce by executive order. Title III of the act reorganized the Shipping Board and it is said that Congress would not have taken this action had it intended to include the Shipping Board within the scope of Section 402 of the act, which defines executive agencies the President may abolish or whose functions he may transfer as "any commission, board, bureau, division, service, or office in the executive branch of the government." That this is true is attested by the fact that Section 406 withheld from the President the authority to abolish or transfer the functions of the Shipping Board. But when the act was amended March 3, 1933,[12] the prohibition was omitted and the phrase "independent establishment" was added to the enumeration of executive agencies in Section 402. After these changes were made the President, by Executive Order dated June 10, 1933, made the transfer. As required by the act of June 30, 1932, he transmitted a copy of the order to the Congress which adjourned a few days after its receipt. Whatever doubt may be entertained as to the intent of Congress that the Shipping Board should be subject to transfer by the President, and, if so, whether the order lay before Congress the requisite number of days to satisfy the statutory mandate, Congress appears to have recognized the validity of the transfer and ratified the President's action by the appropriation acts of April 7, 1934,[13] March 22, 1935,[14] and May 15, 1936,[15] all of which make appropriations to the Department of Commerce for salaries and expenses to carry out the provisions of the shipping act as amended and refer to the executive order. The appellant insists that these references were casual and are not to be taken as ratifying the President's action. We need not stop to consider the argument since, by the Merchant Marine Act of 1936,[16] Section

[11] 47 Stat. 413; 47 Stat. 1517.
[12] 47 Stat. 1517.
[13] C. 104, Title III, 48 Stat. 529, 566.
[14] C. 39, Title III, 49 Stat. 67, 99.
[15] C. 405, 49 Stat. 1309, 1345.
[16] June 29, 1936, c. 858, 49 Stat. 1985.

204 (a), the functions of the former Shipping Board are referred to as "now vested in the Department of Commerce pursuant to Section 12 of the President's Executive Order No. 6166."

It remains to deal with the contentions that Congress lacked the power either to transfer or to ratify the transfer of the duties of the Shipping Board to the Secretary of Commerce by delegating to the President authority so to do by executive order, subject to the approval of Congress, and that the President, in exercising the power delegated to him, exceeded his authority because he acted without notice and hearing and failed in the order adequately to specify the grounds for his action. We find it unnecessary to decide the questions sought to be raised in this connection. On June 29, 1936, Congress adopted the Merchant Marine Act. By Section 204(a) of that statute it was provided:

"All the functions, powers, and duties vested in the former United States Shipping Board by the Shipping Act, 1916, . . . and amendments, . . . and now vested in the Department of Commerce pursuant to Section 12 of the President's Executive Order of June 10, 1933, are hereby transferred to the United States Maritime Commission" . . .

The Commission is created by the Act. By Section 204 (b) it is authorized to adopt all necessary rules and regulations to carry out the powers, duties, and functions vested in it by the act. October 21, 1936, after organization, the Commission promulgated an order (General Order No. 2)[17] in which it declared:

". . . all orders, . . . which have been issued or authorized by . . . the Department of Commerce, in the exercise of the functions, powers, and duties transferred to this Commission by the Merchant Marine Act, 1936, and which are in effect at the time of such transfer, shall continue in effect, insofar as not in conflict with said Act, until modified, terminated, superseded, or repealed by this Commission or by operation of law; . . ."

We are of opinion that the Act of 1936 and the Commission's order render moot the constitutional questions sought to be raised by the appellant even though we assume, without deciding, that the Secretary of Commerce had no power to issue the order of November 18, 1935. That order was administrative in character. It determined no rights and prescribed no duties of the appellant as an ocean carrier. It demanded the filing of data. No

[17] The Federal Register, No. 159, October 23, 1936, p. 1917.

notice or hearing was prerequisite to its issue. It was still *in fieri* when the United States Maritime Commission came into existence. By virtue of the action of that commission it is continued in force and the appellant is commanded to obey it. The appellant concedes that if the order was within the constitutional and statutory powers of the Shipping Board, and had been made by that board, there could be no question of its validity. As it has become an outstanding administrative order of a commission having the powers and duties formerly vested in the Shipping Board the appellant is in no position to contend that, as it now affects the appellant, the order is void because issued in the alleged unconstitutional exercise of the powers of the Shipping Board by the Secretary of Commerce.

The decree is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.